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Supreme Court, U.S.
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No. 00-0000

IN THE
Supreme Court of the United States

FREDERICK FRANK
Petitioner

v.

JOSEPH NARA
Respondent

ON PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the criteria used by the court of appeals for determining whether a state prisoner has "fairly presented" his federal claim to the state courts – which does not require the prisoner to cite to a federal source of law or to label the claim as federal – is contrary to the exhaustion requirement described in *Baldwin v. Reese*, 541 U.S. 27 (2004).

2. Whether the criteria used by the court of appeals for determining whether a state prisoner has "fairly presented" his federal claim to the state courts – which allows the prisoner to raise a federal claim by implication by citing analogous state law – is contrary to the exhaustion requirement set forth in *Baldwin v. Reese*, 541 U.S. 27 (2004).

3. Whether the decision of the court of appeals that state prisoner Joseph Nara "fairly presented" his federal due process claim to the Pennsylvania courts is contrary to *Duncan v. Henry*, 513 U.S. 364 (1995), and *Baldwin v. Reese*, 541 U.S. 27 (2004), when Nara failed to label his claim as a federal or due process claim, failed to cite the state courts to any federal source of authority in support of his claim, and relied exclusively on state court cases, in particular *Commonwealth v. Marshall*, 312 A.2d 6 (Pa. 1973), which contains no reference to federal law or due process.

PARTIES TO THE PROCEEDING

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OPINIONS AND ORDERS BELOW

The opinion and order of the court of appeals denying the Commonwealth's motion to stay mandate is published and is reprinted in Pet. App. 1a. *Nara v. Frank*, 494 F.3d 1132 (3d. Cir. 2007). The order of the court of appeals denying the Commonwealth's petition for rehearing is unpublished and is reprinted in Pet. App. 1b. The order of the court of appeals amending its opinion is unpublished and is reprinted in Pet. App. 1c. The opinion and order of the court of appeals affirming the district court is published and is reprinted in Pet. App. 1d. *Nara v. Frank*, 488 F.3d 187 (3d. Cir. 2007). The order of the district court adopting the magistrate judge's report and recommendation is unpublished and reprinted in Pet. App. 1e. The magistrate judge's report and recommendation recommending that the petition for writ of habeas corpus be granted is unpublished and reprinted in Pet. App. 1f.

STATEMENT OF JURISDICTION

The Court of Appeals affirmed the district court's order granting the petition for writ of habeas corpus on May 8, 2007. The court of appeals amended its opinion and denied rehearing on June 12, 2007. On August 29, 2007, this Court extended the time for the filing of this petition until November 9, 2007. *Frank v. Nara*, No. 07A185. The petition was mailed to the Court in compliance with Rule 29.2 on November 9, 2007, but returned for corrections on November 16,

2007, pursuant to Rule 14.5. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title 28 of the United States Code provides in relevant part:

> (b)[1] An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)[i] there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1).

STATEMENT OF THE CASE

On February 1, 1984, Joseph Nara was arrested and charged with the murders of his wife Delorean Churby and her mother Virginia Ruth Churby. The investigation revealed that on January 28, 1984, at approximately 8:00 p.m., Nara broke into Mrs. Churby's trailer located in Georges Township, Fayette County, Pennsylvania, armed with a loaded .45 caliber automatic. Once inside the trailer, Nara shot his wife two times and her mother three times in the presence of two young children. Prior to the murders, Nara told several people about his plans to kill his wife. After the murders, Nara fled Pennsylvania, but called the Pennsylvania State Police from a motel room in North Carolina and confessed to the murders. Nara was arrested in North Carolina, and was promptly returned to Pennsylvania to answer the charges.

Shortly after his arrest, defense counsel filed a petition for mental examination. The petition was granted, and Nara was originally committed to Mayview State Hospital for a period not to exceed sixty days. However, Nara was discharged after only four days and returned to prison because he did "not appear to be mentally ill, or in need of treatment."

On June 20, 1984, pursuant to a plea agreement, Nara appeared before the trial court and entered guilty pleas to both counts of first-degree murder in exchange for concurrent sentences of life imprisonment. Prior to accepting the guilty pleas, the trial court conducted an exhaustive, on-the-record

colloquy, during which time Nara openly admitted his guilt, repeatedly expressed his understanding of the proceedings, denied under oath having any mental or emotional problems, and communicated intelligently with the court for approximately 1½ hours. During the sentencing, Nara stated that he was deeply sorry for what he had done.

Nara did not file any post-sentence motions, nor did he file a direct appeal.

A. First State Postconviction Petition

On April 25, 1988, Nara filed a *pro se* petition for relief and supporting brief pursuant to the Pennsylvania Post-Conviction Relief Act (PCRA), 42 Pa.C.S. § 9541 *et. seq.*, in which he argued that he was incompetent at the time he entered his guilty pleas and that he received ineffective assistance of counsel. Counsel was appointed to represent Nara, and the PCRA court held a hearing on June 17, 1988, and June 21, 1988. On October 17, 1988, the PCRA court denied Nara's petition.

Nara filed a timely appeal to the Pennsylvania Superior Court, raising only ineffectiveness claims. On March 29, 1989, the Superior Court affirmed the Order of the PCRA court and dismissed Nara's appeal. Nara subsequently filed a petition for allowance of appeal with the Pennsylvania Supreme Court. While Nara raised a federal due process claim in his petition, he did not base that claim on the ground that he was incompetent to plead guilty. The Pennsylvania Supreme Court denied Nara's petition for allowance of appeal on September 21, 1989.

B. Second State Postconviction Petition

On May 15, 1990, Nara filed a second PCRA petition wherein he sought to withdraw his guilty pleas based on a claim of mental incompetency. Nara made no mention of due process in his petition. The PCRA court held hearings on June 27, 1990 and November 19, 1990, and once again no mention of federal law or due process was made. On January 30, 1991, the PCRA court granted Nara's petition and directed that Nara's guilty pleas be withdrawn. The PCRA court concluded that Nara established a "manifest necessity" to withdraw his plea under state law. The PCRA court made no mention of federal law or due process in its opinion.

The Commonwealth appealed to the Pennsylvania Superior Court. In his brief to the Superior Court, Nara addressed the issue of incompetency, but based his claim squarely upon *Commonwealth v. Marshall*, 312 A.2d 6 (Pa. 1973), which makes no reference to federal law or due process and was decided solely on state law grounds. Nara similarly made no mention of federal law or due process anywhere in his brief. On April 30, 1992, the Superior Court vacated the PCRA court's order and reinstated Nara's guilty pleas, finding that the issue of Nara's competence had been waived under state law. The Superior Court made no mention of federal law or due process in its opinion. Nara then filed a petition for allowance of appeal in the Pennsylvania Supreme Court. While Nara did make passing reference to the federal due process clause in his petition, he did not base his

claim on incompetency. Rather, he argued that the Superior Court violated his federal due process rights by vacating the order of the PCRA court on state-law waiver grounds. The Pennsylvania Supreme Court denied Nara's petition on October 7, 1992. This Court denied Nara's petition for *certiorari* on March 22, 1993. *Nara v. Pennsylvania*, 507 U.S. 995 (1993).

C. Third State Postconviction Petition

On December 21, 1995, Nara filed a third PCRA petition, alleging a federal due process violation on the grounds of ineffective assistance of counsel, as well as a claim that the factual basis for the guilty plea was insufficient. The court appointed attorney Phyllis Jin, Esquire, to represent Nara and scheduled a hearing for April 30, 1996. At the hearing, Nara's counsel asked to withdraw his third PCRA petition because the issue he raised was "previously litigated" in favor of filing a motion to withdraw his guilty plea *nunc pro tunc* pursuant to Pennsylvania Rule of Criminal Procedure 321. The Court granted Nara's motion and issued a briefing schedule. On June 23, 1996, Attorney Jin filed a memorandum in support of Nara's motion to withdraw his guilty plea. On September 30, 1996, the PCRA court denied Nara's motion to withdraw his pleas, concluding that Nara had been advised at his sentencing hearing in 1984 of his right to move to withdraw the pleas within ten days. The court found that Nara failed to state a compelling reason that explained his decision to wait twelve years before he sought to withdraw his guilty plea.

On July 9, 1997, the Superior Court affirmed the trial court's decision which denied Nara's motion to withdraw his guilty pleas. On December 8, 1997, the Pennsylvania Supreme Court denied Nara's petition for allowance of appeal. Nara's filings in the Pennsylvania Superior and Supreme Courts relied exclusively on state law, and there was no mention of federal law or due process in either of these documents.

D. Federal *Habeas* Petition

On or about January 4, 1999, the district court received Nara's federal *habeas corpus* petition. The district court referred the case to a magistrate judge, who recommended that the petition be dismissed as untimely. The district court adopted the magistrate judge's recommendations and dismissed Nara's federal habeas petition. However, the court of appeals reversed and remanded the case to the district court with directions to conduct an evidentiary hearing in order to determine whether equitable tolling was warranted. *Nara v. Frank,* 264 F.3d 310, 319-20 (3d Cir.2001), *overruled in part by Carey v. Saffold,* 536 U.S. 214, 122 S.Ct. 2134, 153 L.Ed.2d 260 (2002). Following an evidentiary hearing, the district court concluded that equitable tolling was warranted and that Nara's petition should be considered to have been timely filed. *Id.*

Nara filed an amended petition on September 23, 2004. In his amended petition, Nara argued *inter alia* that his federal due process rights were violated because he was mentally incompetent at the time he entered his guilty pleas. The Commonwealth

answered the amended petition, arguing *inter alia* that Nara's claim was procedurally barred because he did not exhaust or "fairly present" his federal due process claim in the Pennsylvania courts, and that the time for doing so had expired. On September 1, 2005, the magistrate judge issued a report recommending that the amended petition be granted and that Nara be permitted to withdraw his guilty pleas. In so doing, the magistrate judge concluded that Nara had "fairly presented" his federal due process claim to the Pennsylvania courts because Nara "relied on state cases employing the correct constitutional analyses and presented his claim in specific terms that directly pointed to a right protected by the Constitution." The report and recommendation was adopted by the district court on September 27, 2005.

The court of appeals affirmed. *Nara v. Frank*, 488 F.3d 187 (3d. Cir. 2007).[1] Addressing the exhaustion issue, the court of appeals used the following standard:

> A petitioner can "fairly present" his claim through: (a) reliance on pertinent federal cases; (b) reliance on state cases employing constitutional analysis in like fact situations; (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution; and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation.

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[1]The court of appeals had jurisdiction over the appeal pursuant to 28 U.S.C. § 1291, 2253.

Nara, 488 F.3d at 198 (citing *McCandless v. Vaughn*, 172 F.3d 255, 260 (3d Cir.1999)). Applying this standard, the court of appeals concluded that Nara "fairly presented" his federal due process claim to the Pennsylvania courts because:

> Nara's second petition included a claim that his guilty plea was "unlawfully induced." Appendix at 436. [Nara's attorney] orally amended Nara's *pro se* petition to specifically include the argument that Nara was "not competent to make a knowledgeable and willing plea at the time he entered it." Appendix at 448. After [the trial court] granted Nara's petition and the Commonwealth appealed, Nara argued that he established his mental incompetency to plead guilty, articulated the test applied by both federal and state courts, and compared the facts of his case to *Com. v. Marshall*, 454 Pa. 413, 312 A.2d 6 (1973). Appendix at 885-87. When he again sought *allocatur*, Nara specifically raised "the invalidity of his plea," and, citing *Marshall*, stated that he "was mentally ill and incompetent to knowingly answer the plea court's questions." Appendix at 830. Nara consistently presented the basic factual outline of a federal claim. The Pennsylvania courts were not required to search beyond the pleadings and briefs for a federal issue. *Compare Baldwin v. Reese*, 541 U.S. 27, 124 S.Ct.

> 1347, 158 L.Ed.2d 64 (2004), *and Bronshtein v. Horn*, 404 F.3d 700, 725-26 (3d Cir.2005). We conclude Nara properly exhausted his incompetency claim.

Nara, 488 F.3d at 198-199. The court of appeals arrived at this conclusion even though Nara failed to label his incompetency claim as federal, failed to cite the state courts to any federal source of authority in support of his incompetency claim, and relied exclusively on state court cases, in particular *Commonwealth v. Marshall*, which contains no reference to federal law or due process whatsoever.

This petition follows.

REASONS FOR GRANTING THE WRIT

The Court should grant the petition for writ of *certiorari* in this federal habeas corpus case because there is a conflict between the court of appeals below and other federal courts of appeal on the issue of what constitutes exhaustion or "fair presentation" of a federal claim to a state court when a state prisoner does not label the claim as federal or cite to a federal source of law. In *Baldwin v. Reese*, 541 U.S. 27 (2004) and *Howell v. Mississippi*, 543 U.S. 440 (2005), this Court declined to address the issue of whether a state prisoner's citation to a state-law rule that is identical to federal law would be sufficient to satisfy the exhaustion requirement. Since that time, the federal courts of appeal are split on the issue. This conflict is central to the outcome of this case, and this Court should grant this petition in order to resolve the conflict.

"An application for a writ of habeas corpus on behalf of a person in state custody pursuant to the judgment of a State court shall not be granted unless it appears that – (A) the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. §2254(b)(1)(A). In *Picard v. Connor*, 404 U.S. 270 (1971), this Court held that the exhaustion requirement requires state prisoners to "fairly present" federal claims to each appropriate state court in order to give the State an "opportunity to pass upon and correct" alleged violations of federal rights. *Id.* at 512.

Three years ago, in *Baldwin v. Reese*, 541 U.S. 27 (2004), this Court held that "ordinarily a state prisoner does not 'fairly present' a claim to a state court if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim in order to find material, such as a lower court opinion in the case, that does so." *Id.* at 32. In so doing, this Court indicated that:

> A litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court petition or brief, for example, by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim "federal."

Id. at 32 (hereinafter "*Baldwin* criteria"). One year later, this Court relied upon the *Baldwin* criteria in dismissing a writ of *certiorari* as improvidently granted. In *Howell v. Mississippi*, 543 U.S. 440 (2005) (per curiam), this Court held that a state prisoner failed to "fairly present" his federal claim to the state courts because "he did not cite the Constitution or even any cases directly construing it, much less any of this Court's cases." *Id.* at 443. Endorsing the *Baldwin* criteria, this Court noted "the same steps toward clarity are just as easy to take and are generally necessary to establish that a federal question was properly presented to a state court." *Id.* at 444.

The federal courts of appeal have generally interpreted the *Baldwin* criteria as illustrative rather

than binding, despite the language in *Howell* that such language is "generally necessary." *Id.* Fueled in part by other language in the *Howell* opinion in which the Court assumed without deciding that the "fair presentation" requirement might be satisfied if the state prisoner cites to state law that is "identical" or "virtually identical" to federal law, a split in the circuits has emerged on the issue of what constitutes "fair presentation" of a federal claim to a state court when the state prisoner does not label his claim as federal or cite to a federal source of law. For example, the First, Second and Third Circuits have held that citation to a state case addressing a state claim that is "indistinguishable from" or "shares the same legal standard" as one arising under federal law is sufficient to satisfy the exhaustion requirement. *Clements v. Maloney*, 485 F.3d 158 (1st. Cir. 2007); *Jackson v. Edwards*, 404 F.3d 612 (2d. Cir. 2005); *Nara v. Frank*, 488 F.3d 187 (3d. Cir. 2007). The Eighth Circuit has held to the contrary. *Carney v. Fabian*, 487 F.3d 1094 (8th Cir. 2007) ("In order to fairly present a federal claim to the state courts, the petitioner must have referred to a specific federal constitutional right, a particular constitutional provision, a federal constitutional case, or a state case raising a pertinent federal constitutional issue in a claim before the state courts.") (emphasis supplied). Moreover, several Circuits have created other, more ambiguous factors for determining whether the exhaustion requirement is satisfied in the absence of a federal label or citation to federal sources of law. For example, the Second, Third, Sixth, and Seventh Circuits have all held that an allegation of a pattern of facts that is "well within the mainstream of constitutional litigation" is sufficient to satisfy the exhaustion requirement. *DiSimone v. Phillips*, 461

F.3d 181 (2d. Cir. 2006); *Nara v. Frank*, 488 F.3d 187 (3d. Cir. 2007); *Williams v. Anderson*, 460 F.3d 789 (6th Cir. 2006); *Lieberman v. Thomas*, --- F.3d ---, 2007 WL 2937074 (7th Cir. 2007). The First Circuit has rejected this factor. *Adelson v. DiPaola*, 131 F.3d 259, 263 (1st. Cir. 1997) ("Rhetoric arguing that a claim previously asserted without federal citation or other conspicuous federal emblemata nonetheless fell within some hypothetical 'mainstream of constitutional litigation' has an oxymoronic quality.")

This conflict between the Circuits is central to the outcome of this case. The court of appeals held that state prisoner George Nara "fairly presented" his federal due process claim to the Pennsylvania courts that he was incompetent to plead guilty to two counts of first degree murder. This decision was predicated on two factors: (1) Nara's use of certain buzzwords in his state court filings – that his guilty plea was "unlawfully induced" and that he was "not competent to make a knowledgeable and willing plea" – that the court of appeals concluded were terms "so particular as to call to mind a specific right protected by the Constitution"; and (2) Nara's citation to *Commonwealth v. Marshall*, 454 Pa. 413, 312 A.2d 6 (1973), which contains no references to federal law but describes a state standard for determining incompetency that is virtually identical to federal law.

The decision of the court of appeals appears to strongly conflict with the requirements of *Baldwin* and *Duncan* that state prisoners label their claims as federal or cite to federal source of law in their state court filings to satisfy the exhaustion requirement. *See Howell*, 543 U.S. at 444 (describing the *Baldwin*

criteria as "generally necessary to establish that a federal question was properly presented to a state court."). Indeed, the record is clear that Nara failed to label his incompetency claim as federal in his state court filings, failed to cite the state courts to any federal source of authority in support of his incompetency claim, and relied exclusively on state court cases, in particular *Commonwealth v. Marshall*, which contains no reference to federal law or due process whatsoever.

In the alternative, even if this Court intended the *Baldwin* criteria to be illustrative rather than binding, Nara is situated in the Third Circuit, which uses a broad, four-pronged test for determining whether a state prisoner has exhausted his federal claim:

> A petitioner can "fairly present" his claim through: (a) reliance on pertinent federal cases; (b) reliance on state cases employing constitutional analysis in like fact situations; (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution; and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation.

Nara, 488 F.3d at 198 (citing *McCandless v. Vaughn*, 172 F.3d 255, 260 (3d Cir.1999)). As illustrated in the lower courts, this standard permits a state prisoner to satisfy the exhaustion requirement by citing to state cases that rely on state law that is analogous to federal law. If Nara were located in the Eighth

Circuit, such language would not be enough. The final outcome of this twenty-three year old double-murder case should not depend upon something so arbitrary as the location of the crime. A writ of *certiorari* should issue.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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DATE:
November 28, 2007

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-4779

JOSEPH NARA

v.

FREDERICK FRANK,

Appellant

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 99-cv-00005)
District Judge: The Honorable Terrence F. McVerry

BEFORE: SMITH, WEIS, and NYGAARD, Circuit Judges.

(Filed July 17, 2007)

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OPINION SUR MOTION TO STAY THE MANDATE AND ORDER OF THE COURT

NYGAARD, Circuit Judge.

Presently before the Court is a motion by the Commonwealth of Pennsylvania to stay the mandate of our decision in *Nara v. Frank*, No. 05-4779, pending its filing of a petition for writ of *certiorari*. Familiarity with this Court's opinion in the underlying litigation is presumed. *Nara v. Frank*, – F.3d – 2007 WL 1321929 (3d Cir. May 8, 2007).

In exceptional cases, a party may obtain a stay of our mandate if it can demonstrate that its petition presents a "substantial question and that there is good cause for a stay." FED. R. APP. P. 41(d)(2)(A) (2007). This standard requires the movant to show: (1) a reasonable probability that the Supreme Court will grant *certiorari*; (2) a reasonable possibility that at least five Justices would vote to reverse this Court's judgment; and (3) a likelihood of irreparable injury absent a stay. In a close case, the movant should make a showing that, on balance, the interests of the parties and the public favor a stay. *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers); *Bricklayers Local 21 v. Banner Restoration, Inc.*, 384 F.3d 911, 912 (7th Cir. 2004) (Ripple, J., in chambers); *Doe v. Miller*, 418 F.3d 950, 951 (8th Cir. 2005); FED. R. APP. P. 41(d) advisory committee's note.

The Commonwealth has failed to meet these requirements. First, the Commonwealth contends that the Supreme Court's holding in *Baldwin v. Reese*, 541 U.S. 27, 32 (2004), limited the viability of the analysis we set forth in *McCandless v. Vaughn*, 172 F.3d 255, 260 (3d Cir. 1999), but it has not demonstrated that the state courts were required to look beyond Mr. Nara's petitions or briefs for a federal claim. Second, the Commonwealth argues that we gave insufficient deference to the state courts' rulings and erred in concluding that Nara's competency claim was not procedurally defaulted. The Commonwealth, however, does not develop these arguments in any way, much less cite authority to suggest that at least five Justices would disagree with our analysis.

Finally, the Commonwealth has failed to show that an "irreparable injury" is likely absent a stay. Nothing prevents the Commonwealth from preparing to commence trial within 120 days while simultaneously filing a petition for *certiorari*.

For the foregoing reasons, it is ORDERED that the motion to stay the mandate is DENIED. This is without prejudice to the applicant's right to file a timely petition for writ of *certiorari*.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Case No: 05-4779

JOSEPH NARA

V.

FREDERICK FRANK, Appellant

SUR PETITION FOR REHEARING

Present: SCIRICA, Chief Judge, SLOVITER, McKEE, BARRY, AMBRO, FUENTES, SMITH, CHAGARES, JORDAN, HARDIMAN, WEIS, and NYGAARD, Circuit Judges*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in

regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

/S/ Richard L. Nygaard
Circuit Judge

Dated: June 12, 2007
DMM/cc: Lisa Freeland, Esq.
Christopher D. Carusone, Esq.

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* The votes of the Honorable Joseph F. Weis, Jr., and the Honorable Richard L. Nygaard, are limited panel rehearing.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Case No: 05-4779

JOSEPH NARA

V.

FREDERICK FRANK,
Appellant

On Appeal from the United States District Court for the Western District of Pennsylvania
(D.C. No. 99-cv-00005)
District Judge: the Honorable Terrence F. McVerry

Argued on October 26, 2006
BEFORE: SMITH, WEIS, and NYGAARD, Circuit Judges

ORDER AMENDING OPINION
(Filed June 12, 2007)

NYGAARD, *Circuit Judge*

It is now ordered that the published Opinion in the above case, filed on May 2007, is hereby amended as follows:

At page 13, line 26, insert the following:

"First, the District Court found that the Magistrate Judge served the R&R upon Mr. Nara and the Commonwealth's attorney's by first class mail. The Commonwealth has presented no evidence to the contrary.

In the next sentence, delete "First" and insert "Second."

At page 14, line 4, delete "Second" and insert "Finally"

By the Court,

/s/ Richard L. Nygaard
Circuit Judge

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-4779

JOSEPH NARA

v.

FREDERICK FRANK,

Appellant

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 99-cv-00005)
District Judge: The Honorable Terrence F. McVerry

ARGUED OCTOBER 26, 2006
BEFORE: SMITH, WEIS, and NYGAARD, Circuit Judges.

(Filed May 8, 2007)

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OPINION OF THE COURT

NYGAARD, Circuit Judge.

In *Nara v. Frank*, 264 F.3d 310 (3d Cir. 2001), we held that the equitable tolling doctrine might allow the District Court to consider Joseph Nara's otherwise untimely habeas corpus petition. Upon remand, the District Court found equitable tolling applicable, and granted Nara's petition based upon his claim that he was mentally incompetent when he pleaded guilty to murdering his wife and mother-in-law. The Commonwealth appealed. We will affirm.

I. Factual and Procedural History

A. Conviction and Incarceration

Joe Nara's wife, DeLorean Churby, left him. Over the next few weeks, Nara grew despondent and

visited the Fayette Community Mental Health Center on an outpatient "crisis" basis. Nara attempted suicide by taking an overdose of sleeping tablets and remained unconscious for two days in the hospital. He was then involuntarily committed to the Connellsville State General Hospital and treated with anti-depressants and an antipsychotic tranquilizer.

After four days at Connellsville, Nara was released. Soon thereafter, Nara discovered love letters between Churby and Pennsylvania State Trooper Leonard Maharowski. Nara argued with his wife over the telephone, and she taunted him with details of her affair. Enraged, Nara drove to confront her at her mother's trailer.

When he arrived and knocked on the trailer's door, Churby's mother aimed a shotgun in his face and told him to leave. Infuriated, Nara went to his car and got his pistol. He returned to the house, shot the door's lock and burst in. Again, Churby's mother aimed the shotgun at him, and his wife repeatedly struck him with a telephone. Amid the struggle, Nara shot and killed both women.

Nara fled to North Carolina. Within a day, however, he made several calls to the Pennsylvania State Police and to his father, and admitted he killed the Churbys. He turned himself in and was returned to Pennsylvania to face two charges of first degree murder. He was then confined at the Fayette County prison.

Nara's family retained attorney Charles Gentile as counsel. His family grew fearful that he would harm himself in prison, and John Walton of the

Fayette County Mental Health Center advised Gentile that Nara was in need of immediate evaluation and help. Gentile filed a petition under the Pennsylvania Mental Health Act, 50 PA. STAT. ANN. § 4407- 4411, requesting that the Fayette County Court of Common Pleas transfer Nara to Mayview State Hospital for psychiatric evaluation and commitment because he was a risk of harm to himself or others. Gentile did not seek an evaluation to establish Nara's competency to stand trial or to assess his sanity at the time of the killings. Fayette County Common Pleas Judge Richard Cicchetti granted Gentile's motion and transferred Nara to Mayview.

At Mayview, Duncan Campbell, M.D., decided that Nara should be observed, but did not place him on any routine medication. Later that day, staff psychologist James T. Nelson and an associate, David Bert, evaluated Nara more closely. They recommended suicide precautions and treatment for depression.

Just four days later, staff psychologist Lilian Meyer, Ph.D., reported that Nara was neither mentally ill nor in need of treatment. She did not comment on Nara's competency to stand trial or his sanity at the time of the killings. However, she noted the "seriousness" of the accusations against him and allegations that he planned to escape, and recommended Nara be transferred back to the county prison. He was transferred back to the prison, where he remained untreated for the next four months.

On June 20, 1984, Nara appeared before Fayette County Court of Common Pleas Judge

William J. Franks and pleaded guilty to two counts of murder in the first degree. During an exhaustive 85-minute colloquy, Nara admitted he "really did intentionally kill" his wife, denied having been treated for any mental or emotional illnesses, and repeatedly affirmed his understanding of the proceedings. On July 13, 1984, Judge Franks sentenced Nara to two concurrent life sentences. Nara did not file a direct appeal to the Pennsylvania Superior Court.

The court transferred Nara to the State Correctional Institution at Pittsburgh (SCIP). SCIP officials immediately placed Nara at the facility's medical unit "for psychiatric reasons," placed a leg restraint on him to reduce the risk of suicide, and treated him with anti-depressants and anti-psychotic medications. An attending physician noted Nara had "intense suicidal ideation of severe proportions," and Nara told him he attempted to hang himself at the county prison following his arrest. Within three weeks, SCIP officials initiated involuntary commitment proceedings. On September 10, 1984 – eighty-two days after the plea colloquy – Nara was committed to Farview State Hospital as a suicide risk. Nara spent 90 days at Farview,
and then returned to SCIP's medical facility.

On February 19, 1985, Nara again attempted suicide and was recommitted to Farview. He remained there for about a year and a half, and was then returned to prison.

B. State Post-Conviction Proceedings

1. First Post-Conviction Relief Proceeding

On April 25, 1988, Nara filed a *pro se* petition and brief for post-conviction relief under the Pennsylvania Post Conviction Hearing Act (PCHA).[1] In his brief, Nara claimed (1) the court violated his constitutional rights by accepting his pleas while he was mentally incompetent; and (2) his trial counsel, Gentile, was ineffective for failing to have his competency evaluated. Judge Franks appointed Fayette County Public Defender Richard E. Bower to represent Nara and held evidentiary hearings at which Nara, his father, his two brothers, and Attorney Gentile testified. After the hearings, Judge Franks, treating the petition as alleging only ineffective assistance of counsel, concluded that Gentile was not ineffective, and denied the petition.[2] Bower filed an appeal on Nara's behalf to the Superior Court raising only his ineffective assistance of counsel claim. The Superior Court denied Nara's appeal for failing to conform to the newly-enacted PCRA, 42 PA. STAT. ANN. § 9543.[3] Bower ended his representation of Nara, and Nara filed a *pro se* petition for allowance of appeal in

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[1] The Pennsylvania legislature replaced the PCHA with the Post Conviction Relief Act (PCRA) 12 days before Nara filed his petition. Nara's appointed counsel, Mr. Bower, did not amend Nara's petition to comply with the PCRA.

[2] We previously noted Franks' apparent error in *Nara v. Frank*, 264 F.3d 310, 312 (3d Cir. 2001), *overruled in part*, *Carey v. Saffold*, 536 U.S. 214 (2002).

[3] The Superior Court held that Nara failed to argue that Gentile's alleged errors undermined the reliability of his conviction or how those errors harmed him. Appendix at 433.

which he re-asserted his incompetency claim and his ineffective assistance of counsel claim. The Pennsylvania Supreme Court denied his *pro se* petition for *allocatur*.

2. Second Post-Conviction Relief Proceeding

On May 15, 1990, Nara filed a *pro se* PCRA petition in which he alleged his guilty plea was "unlawfully induced," and that his first PCRA counsel was ineffective because he failed to amend his petition to comply with the PCRA, failed to seek *allocatur*, and failed to preserve state and federal constitutional claims for federal habeas review. Judge Franks appointed Mark Morrison, Esq.,[4] to represent Nara and allowed Nara to amend his petition to specifically claim that he was mentally incompetent when he pleaded guilty. Judge Franks held hearings on Nara's incompetency claim and heard testimony from him and Dr. Jobindar Harika,[5] a forensic psychiatrist who

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[4] Morrison represented Nara before the PCRA court, the Superior Court, the Pennsylvania Supreme Court, and the United States Supreme Court.

[5] At the time, Dr. Harika had worked in psychiatry for eight years. He spent four years at the Behavioral Clinic of Allegheny County, two years on staff at the Woodward State Hospital, and spent four years as a director at the Forensic State Hospital from 1986-1990. Harika was also a consultant to the Cambria County Jail, the Westmoreland Correction Center, the Somerset County Jail, and the Fayette County Prison. He previously testified in Pittsburgh and Washington county proceedings.

met with Nara and thoroughly reviewed his medical records. Harika opined that Nara was probably "psychotic" and incapable of entering a plea. The Commonwealth did not present rebuttal testimony. Judge Franks, in a memorandum opinion, concluded Nara was incompetent when he pleaded guilty, based on "the totality of the circumstances," and Harika's "quite convincing" and "unrebutted testimony."[6] Judge Franks issued an order allowing Nara to withdraw his guilty pleas, and the Commonwealth appealed.

On April 30, 1992, the Superior Court reversed, vacated Judge Franks' order, and reinstated Nara's guilty pleas. The Superior Court held that Nara (1) waived his incompetency claim by failing to raise it in his first post-conviction petition pursuant to PCRA §9544(b);[7] (2) failed to show his claim was not previously litigated and not waived pursuant to PCRA §9543(a)(3); and (3) waived his right to withdraw his guilty pleas by failing to challenge their validity within ten days, according to PA. R. CRIM. P.

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[6] Under Pennsylvania law, once a plea has been entered and sentence imposed, a guilty plea may be withdrawn on a showing of manifest injustice, which may be established if the plea was not knowingly and voluntarily given. Com. v. Leidig, 850 A.2d743, 746 (Pa. Super. 2004); Com. v. Starr, 301 A.2d 592, 595 (pa. 1973).

[7] As noted *supra*, Nara raised his incompetency claim in his first *pro se* petition, but Judge Franks failed to address it.

321 (now PA. R. CRIM. P. 720). Nara appealed. The Pennsylvania Supreme Court denied *allocatur* and the United States Supreme Court denied *certiorari*.[8]

3. Third Post-Conviction Relief Proceeding

On December 21, 1995, Nara filed a third *pro se* petition, alleging, *inter alia*, that he was incompetent when he entered his guilty plea. Judge Franks appointed Phyllis Jin, Esq., to represent Nara. Franks permitted Nara to withdraw his third PCRA petition in favor of a motion to withdraw his guilty pleas *nunc pro tunc*. Judge Franks, following the Superior Court's previous ruling, found Nara waived his incompetency claim because he failed to challenge his guilty plea within ten days of making it, and denied the motion. Nara appealed, claiming he should have been allowed to withdraw his guilty pleas *nunc pro tunc* because Judge Franks had previously found him incompetent.[9] Appendix at 664. The Superior Court affirmed, and the Pennsylvania Supreme Court denied *allocatur*.

C. Federal Habeas Corpus Proceedings

On December 12, 1998, Nara filed a *pro se* petition for a writ of habeas corpus in the U.S. District Court for the Western District of Pennsylvania. The District Court referred the case to

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[8]Nara raised his incompetency claim in his petition for allowance of appeal, Appendix at 830, and in his petition for *certiorari*, *Id.* at 586.

[9] Nara made the same claim to the Pennsylvania Supreme Court. Appendix at 706.

Magistrate Judge Francis X. Caiazza, who issued a report and recommendation (R&R) recommending that the District Court dismiss Nara's petition because Nara failed to file his petition within the Anti-Terrorism and Effective Death Penalty Act's one-year statute of limitations. *See* 28 U.S.C.A. §2244(d) (2006). Over Nara's objections, the District Court adopted the R&R and denied his petition as untimely.

Nara appealed, and we remanded the cause to the District Court for a hearing on whether Nara's "ongoing periods of mental incompetence" and allegations that Ms. Jin abandoned him following his appeal to the Pennsylvania Supreme Court, justified equitably tolling the statute of limitations. *Nara v. Frank*, 264 F.3d 310 (3d Cir. 2001), *overruled in part, Carey v. Saffold*, 536 U.S. 214 (2002).

Magistrate Judge Caiazza held evidentiary hearings on the matter and found Ms. Jin "affirmatively misled" Nara and thereby prevented him from timely filing his petition for habeas corpus. *Nara v. Frank*, No. 99-5, 2004 WL 825858 (W.D.Pa. March 10, 2004). Magistrate Judge Caiazza filed an R&R recommending that the limitations period be equitably tolled, and the Commonwealth did not file objections. On April 8, 2004, the District Court adopted the R&R and Nara filed an amended petition for a writ of habeas corpus. The Commonwealth answered, and both parties submitted supplemental briefs to the District Court.

On September 1, 2005, Magistrate Judge Caiazza filed an extensive R&R in which he concluded (1) Nara exhausted his incompetency claim by "fairly

presenting" it to each level of the Pennsylvania judiciary; (2) his incompetency claim was not procedurally defaulted; (3) the second PCRA court's conclusion that Nara was incompetent to plead guilty was entitled to a presumption of correctness under 28 U.S.C. §2254(e)(1); and (4) Nara's federal due process rights were violated when he entered his guilty pleas because he was mentally incompetent.

The Magistrate Judge recommended that the District Court grant the petition, allow Nara to withdraw his guilty pleas, and direct the Commonwealth to release him unless it commenced trial within 120 days. In accordance with the Federal Magistrate Judges Act, 28 U.S.C. §636(b)(1)(B)-(C), the R&R provided the parties ten days in which to file objections. The R&R ended with the routine warning that, "Failure to file timely objections may constitute a waiver of any appellate rights." *See, e.g.*, FED. R. CIV. P. 72(b) advisory committee's note.

Neither party filed objections to the R&R. On September 27, 2005, the District Court noted that no objections were filed, adopted the R&R, and issued the recommended order. Over two weeks later – on October 14 – the Commonwealth filed a motion with the District Court requesting *vacatur* pursuant to FED. R. CIV. P. 60(b). The Commonwealth asserted it never received the R&R and requested ten additional days in which to file objections. In response, Nara suggested the District Court grant the Commonwealth ten days to file objections to the R&R, but only if its objections persuaded the court to either reject or amend the R&R. On October 26, before the District Court could rule on the parties' respective

motions, the Commonwealth filed a notice of appeal.[10] The District Court dismissed the Commonwealth's October 14 motion as moot.

II. Jurisdiction

The District Court exercised jurisdiction over Nara's petition for habeas corpus pursuant to 28 U.S.C. §§2241 and 2254. We have jurisdiction pursuant to 28 U.S.C. §§1291 and 2253(a).

III. Standard of Review

A.

Where the District Court relies entirely upon the state court record, we review its decision granting habeas corpus *de novo*. *Satterfield v. Johnson*, 434 F.3d 185, 190 (3d Cir. 2006); *Hartey v. Vaughn*, 186 F.3d 367, 371 (3d Cir. 1999), *cert. denied*, 528 U.S. 1128 (2000). Here, however, Nara argues we should review the District Court's decision for plain error because the Commonwealth failed to object to the Magistrate Judge's R&R within ten days.

Federal Rule of Civil Procedure Rule 60(b)(1) permits a District Court to grant a party relief from a final judgment based upon, *inter alia*, "excusable neglect." FED. R. CIV. P. 60(b) (2007). The test for "excusable neglect" is equitable, and requires us to

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[10] In its reply brief, the Commonwealth asserts it filed its notice of appeal "in an abundance of caution" due to the fact that nearly 30 days had expired since the District Court issued its judgment and order.

weigh the "totality of the circumstances." *Welch & Forbes, Inc. v. Cendant Corp.*, 234 F.3d 166, 171 (3d Cir. 2000) (citing *Pioneer Inv. Servs. v. Brunswick Assocs. LP*, 507 U.S. 380 (1993)). In particular, we consider 1) the danger of prejudice to the other party; 2) the length of the delay and its potential impact on judicial proceedings; 3) the reason for the delay – and whether it was within the movant's control; and 4) whether the movant acted in good faith. *Id.*

There is no evidence the Commonwealth acted in bad faith. Nevertheless, the Commonwealth's overall negligence in handling the matter precludes us from finding "excusable neglect." First, attorneys practicing in the Western District of Pennsylvania were under a standing order to register with the Case Management/Electronic Case Files (CM/ECF) system by July 1, 2005.11 [11]If the Commonwealth's attorneys had complied with that order, they would have received immediate electronic notification that the Magistrate Judge had issued the R&R and could have

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[11] In early 2001, the federal courts began implementing the Case Management/Electronic Case Files (CM/ECF). Under the program, federal courts and parties file and issue all documents electronically (with certain xceptions for *pro se* prisoners, etc.). Attorneys of record receive email notices, containing hyperlinks to documents, immediately upon every filing. The Western District announced its adoption of the program in the fall of 2004 and, on April 20, 2005, issued a standing order making the program mandatory, effective July 1, 2005. *See* Amended Standing Order, Misc. No. 05-6 (W.D.Pa. 2006).

accessed it by hyper-link.[12] Second, the Commonwealth failed to respond to the *District Court's* order for 17 days. Despite the urgency of the situation, the Commonwealth has offered no excuse for this latter delay. We cannot conclude the Commonwealth's failure to object to the R&R for over six weeks was excusable.

B.

It is well-settled that a right, constitutional or otherwise, "may be forfeited in criminal as well as civil cases by the failure to make a timely assertion of the right before a tribunal having jurisdiction to determine it." *United States v. Olano*, 507 U.S. 725, 731 (1993) (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944)). We have supervisory authority to impose a rule of waiver when a party fails to timely object to a magistrate judge's R&R. *Thomas v. Arn*, 474 U.S. 140 (1985). We have held generally that failing to timely object to an R&R in a civil proceeding may result in forfeiture of *de novo* review at the district court level, but does not forfeit the statutory right to appellate review under other standards. *Henderson v. Carlson*, 812 F.2d 874, 878-79 (3d Cir. 1987), *cert. denied*, 484 U.S. 837 (1987). We now hold that, where a party fails to file timely objections to a magistrate judge's R&R in a habeas proceeding, and the district court then adopts the R&R, we will only review the R&R for plain error.

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[12] The Commonwealth's Attorneys based in Harrisburg were required to register in the Middle District of Pennsylvania in 2003. *See* Standing Order No. 07-01 (M.D.Pa. 2007).

Article III requires *de novo* review of a magistrate judge's R&R where a party timely objects. *United States v. Peretz*, 501 U.S. 923 (1991). The Federal Magistrate Judges Act neither precludes nor mandates a particular standard of appellate review where the parties fail to object to the R&R. 28 U.S.C.A. §636(C) (2006). The Federal Rules governing habeas cases do not dictate a particular result where a party fails to timely object, but authorize us to apply the Federal Rules of Civil Procedure where appropriate. FED. R. GOV. §2254 CASES 11 (2007). The relevant civil procedure rule, however, is inapplicable to habeas corpus cases. FED. R. CIV. P. 72(b) advisory committee's note (2007). We therefore turn to our jurisprudence to determine the appropriate standard of review.

In *Henderson*, we considered whether the Government waived its right to appeal by failing to make a timely objection to a magistrate judge's recommendation that the district court grant habeas relief to a federal prisoner. We recognized our authority to adopt a waiver rule under *Thomas v. Arn*, 474 U.S. 140 (1985), and noted that a majority of the courts of appeals had adopted one. We nonetheless rejected an outright waiver rule because we were concerned that it would (1) entangle the court in a web of equitable exceptions, and (2) deprive a party of any review of unobjected-to dispositive legal issues raised in the R&R. *Henderson*, 812 F.2d at 878.[13]

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[13]Before *Henderson*, we declined to adopt a waiver rulewhere the magistrate judge's report treated filing of objections as permissive. *Welch v. Heckler*, 808 F.2d 264, 266 (3d Cir. 1986). The R&R in this case,

Soon after *Henderson*, we held that a party who does not appeal a magistrate judge's non-dispositive order (under 28 U.S.C. §636(b)(1)(A)) to the district court waives its right to seek review of the order in the Court of Appeals. *United Steelworkers of Am. v. New Jersey Zinc Co., Inc.*, 828 F.2d 1001 (3d Cir. 1987); *Continental Cas. Co. v. Dominick D'Andrea Inc.*, 150 F.3d 254 (3d Cir. 1998). The *New Jersey Zinc* and *D'Andrea* panels recognized *Henderson*, but saw a distinction between subsection (A) referrals, which give the magistrate judge's orders the force of law; and subsection (B) referrals, which do not carry the force of law until the district court adopts the R&R. *New Jersey Zinc*, 828 F.2d at 1005-006; *D'Andrea*, 150 F.3d at 250. Both panels concluded a waiver rule in subsection (A) cases supported the Magistrate Judges Act's purpose – "to relieve courts of unnecessary work and to improve access to the courts." *New Jersey Zinc* at 1007; *D'Andrea* at 251 (internal citations omitted).

Six other courts of appeals apply a waiver rule against untimely objections to a dispositive order or R&R. *Henley Drilling Co. v McGee*, 36 F.3d 143, 150-51 (1st Cir. 1994); *FDIC v. Hillcrest Assocs.*, 66 F.3d 566, 569 (2d Cir. 1995); *United States v. George*, 971 F.2d 1113, 1118 n.7 (4th Cir. 1992); *Kelly v. Withrow*, 25 F.3d 363, 366 (6th Cir. 1994); *cert. denied*, 513 U.S. 1061 (1994); *Video Views, Inc. v. Studio 21, Ltd.*, 797

(continued) however, plainly treated the timely filing of objections as mandatory.

F.2d 538, 539 (7th Cir. 1986);[14] *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

Other courts of appeals have adopted more lenient qualified forfeiture rules, like the one we adopted in *Henderson*. *Douglass v. United Services Auto. Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (*en banc*); *Griffini v. Mitchell*, 31 F.3d 690 (8th Cir. 1994); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991); *Henley v. Johnson*, 885 F.2d 790 (11th Cir. 1989).[15]

The Fifth Circuit Court of Appeals' analysis in *Douglass* persuades us that we should review unobjected-to R&Rs, as adopted by a district court, for plain error. First, the *Douglass* court explained its conversion to the plain error standard it now employs. *Douglass*, 79 F.3d at 1421. Initially, the court applied a rule of waiver against unobjected-to R&Rs. Soon thereafter, it adopted a forfeiture rule which permitted plain error review for unobjected-to factual findings and *de novo* review of unobjected-to legal conclusions. *See Douglass*, 79 F.3d at 1422. Fourteen years later, the *Douglass* court recognized its then existing rule was an "anomaly, which caused a great waste of judicial resources" and "was totally at odds with the forfeiture/plain error rule applicable in other

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[14] The Seventh Circuit does not apply its appellate waiver rule where untimely objections are not "egregiously late" and the opposing party has not been prejudiced. *Hunger v. Leininger*, 15 F.3d 664, 668 (7th Cir. 1994), *cert. denied*, 513 U.S. 839 (1994).

[15] The D.C. Circuit Court of Appeals has apparently never adopted a specific rule. *Powell v. United States Bureau of Prisons*, 927 F.2d 1239 (D.C. Cir. 1991).

settings."*Id.* at 1419. Second, the court noted that the Supreme Court, when it approved waiver rules in *Arn*, also approved an "in the interests of justice" exception which is closely analogous to the plain error exception to the contemporaneous objection rule. *Id.* at 1428 (citing *Arn*, 474 U.S. at 155). In conclusion, the *Douglass* court held failure to timely file objections to an R&R "shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court, provided that the party has been served with notice that such consequences will result from a failure to object." *Douglass*, 79 F.3d at 1429.

We conclude plain error review is appropriate where a party fails to timely object to a magistrate judge's R&R in habeas corpus cases. First, plain error review recognizes the difference between failing to timely assert a right, and voluntarily waiving a right. Failing to timely assert a right results in forfeiture, which permits plain error review. *United States v. Olano*, 507 U.S. 725, 733 (1993). Waiver, on the other hand, extinguishes any error. *Id.* Second, failure to timely object to an R&R is little different from, for example, the failure of counsel to timely object to the admission of evidence in open court. *Douglass*, 79 F.3d at 1428. In the latter situation, we regularly review for plain error in criminal and civil proceedings, including habeas cases. *See, e.g., United States v. Harris*, 471 F.3d 507, 511 (3d Cir. 2006); *Franklin Prescriptions, Inc. v. New York Times Co.*, 424 F.3d 336, 338 (3d Cir. 2006); *Clemmons v. Wolfe*, 377 F.3d 322, 325 (3d Cir. 2004). Third, plain error review promotes the effectiveness and efficiency of the lower courts by compelling parties to promptly contest

dispositive issues before the magistrate judge and district judge. Requiring *de novo* review despite a party's failure to timely object, on the other hand, blunts the effectiveness of the Federal Magistrate Judges Act. *Douglass*, 79 F.3d at 1420. It either forces the court of appeals to consider claims that were never reviewed by the district court, or compels the district court to review every issue in every case, even if both parties are satisfied with the R&R. *Arn*, 474 U.S. at 147; *New Jersey Zinc*, 828 F.2d at 1007; *Douglass*, 79 F.3d at 1420. At the same time, plain error review accords with our decisions in *Henderson*, *New Jersey Zinc*, and *D'Andrea* by affording some level of appellate review to all dispositive legal issues raised by an R&R. Finally, plain error review recognizes failure to timely object to an R&R is not a jurisdictional defect. *Grandison v. Moore*, 786 F.2d 146, 148 (3d Cir. 1986). District courts may therefore consider requests by parties for extra time or requests to excuse late filings on adequate justification. *Id.*

By employing plain error review, we remain faithful to *Henderson* by using a straight-forward, frequently-applied standard of review which preserves appellate consideration of dispositive legal issues. In addition, we add precision to *Henderson* and give substance to the oft-repeated warning that "failure to timely object may risk the loss of appellate rights."

The Commonwealth argues that we should nonetheless review the R&R *de novo*, because the District Court reviewed the R&R *de novo*. *See Henderson*, 812 F.2d at 879 n.4. We disagree. There is no indication the District Court conducted an independent review of the entire record and

applicable law *de novo*. *Id*. Nor was the District Court under any obligation to do so. *Medina v. DeGuglielmo*, 461 F.3d 417, 426 (3d Cir. 2006) (citing FED. R. GOV. §2254 CASES 8(b) (2006)).

Finally, as explained *supra*, the Commonwealth's failure to object was not caused by forces outside its control. The Commonwealth attorneys were on notice that (1) the Western District required all practicing attorneys to register to use the CM/ECF system; and (2) failure to object to an R&R risked the loss of appellate rights. If the Commonwealth's attorneys had complied with the Western District's standing order, they would have had immediate notice of the R&R's filing and access to it.

IV. Discussion

A. Exhaustion

Under the plain error standard, we should only reverse the District Court's[16] decision if it made a plain error which affects "substantial rights." *United States v. Olano*, 507 U.S. 725, 732 (1993). An error is "plain" if it is clear or obvious. *Olano*, 507 U.S. 725, 734 (1993). If we discern an error, we will only correct it if the appellant also demonstrates the error "seriously affected the fairness, integrity or public reputation of judicial proceedings." *Id*. at 732 (quoting

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[16]We now refer to the Magistrate Judge's conclusions as those of the District Court because it adopted the R&R in its entirety.

United States v. Atkinson, 297 U.S. 157, 160 (1936)); *Clemmons v. Wolfe*, 377 F.3d at 325.

First, the Commonwealth argues the District Court erred by concluding Nara exhausted his state court remedies with respect to his incompetency claim. The federal habeas statute requires state prisoners to exhaust available state court remedies before seeking federal relief. 28 U.S.C.A. §2254(b) (2006); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). Therefore, a state prisoner must "give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan*, 526 U.S. at 845; *see also Woodford v. Ngo*, 126 S.Ct. 2378, 2386-87 (2006).

A claim is exhausted if it was "fairly presented" to the state courts. *Baldwin v. Reese*, 541 U.S. 27, 29 (2004); *O'Sullivan v. Boerckel*, 526 U.S. at 848; *Cristin v. Brennan*, 281 F.3d 404, 410 (3d Cir. 2002); *Doctor v. Walters*, 96 F.3d 675, 678 (3d Cir. 1996). A petitioner has fairly presented his claim if he presented the same factual and legal basis for the claim to the state courts. *See Duncan v. Henry*, 513 U.S. 364, 366 (1995) (*per curiam*). A petitioner can "fairly present" his claim through: (a) reliance on pertinent federal cases; (b) reliance on state cases employing constitutional analysis in like fact situations; (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution; and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation. *McCandless v. Vaughn*, 172

F.3d 255, 260 (3d Cir. 1999).[17] Even if a state court refuses to consider the claim on procedural grounds, it is still exhausted as long as the state court had the opportunity to address it. *Bond v. Fulcomer*, 864 F.2d 306, 309 (3d Cir. 1989); *Pursell v. Horn*, 187 F.Supp.2d 260, 288 (W.D.Pa. 2002) (Smith, J.).

Nara's incompetency claim arises under the Due Process clause of the Fourteenth Amendment. Due process prohibits a court from accepting a guilty plea unless it is entered "competently," "knowingly and voluntarily." *Godinez v. Moran*, 509 U.S. 389, 397-402 (1992). A criminal defendant is competent to plead guilty if he has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "has a rational as well as factual understanding of the proceedings against

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[17] The Commonwealth suggests the Supreme Court's decision in *Baldwin v. Reese* may have limited the viability of the *McCandless* analysis. We disagree. *Baldwin* held that, "ordinarily a state prisoner does not fairly present a claim to a state court if that court must look beyond a petition or a brief (or similar document) that does not alert it to the presence of a federal claim in order to find material, such as a lower court opinion, that does so." *Baldwin*, 541 U.S. 27, 32 (2004). *Baldwin* concluded that the petitioner's briefs to the state courts in that case did not "fairly present" a federal claim because the briefs cited no case that might alert the state court to the federal nature of the claim, lacked a factual description supporting the claim, and yet cited federal law in support of other claims. *Id.* at 33. These are among the same considerations set out in *McCandless*.

him." *Godinez*, 509 U.S. at 396 (citing *Dusky v. United States*, 362 U.S. 402 (1940)); *United States v. Cole*, 813 F.2d 43, 46 (3d Cir. 1987) (citing *United States ex rel McGough v. Hewitt*, 528 F.2d 339, 342 n.2 (3d Cir. 1975)). Pennsylvania courts have consistently applied the same standard. *See, e.g., Com. v. Frey*, 904 A.2d 866, 872 (Pa. 2006); *Com. v. Marshall*, 312 A.2d 6, 7 (Pa. 1973); *Com. v. Harris*, 243 A.2d 408, 409 (Pa. 1968); *Com. v. Smith*, 469 A.2d 1104, 1107 (Pa. Super. 1983).

Following his second PCRA petition,[18] Nara gave the Pennsylvania courts a full opportunity to address his federal incompetency claim by repeatedly stating his claim "in terms so particular as to call to mind a specific right protected by the Constitution." *McCandless v. Vaughn*, 172 F.3d at 260. Nara's second petition included a claim that his guilty plea was "unlawfully induced." Appendix at 436. Attorney Morrison orally amended Nara's *pro se* petition to specifically include the argument that Nara was "not competent to make a knowledgeable and willing plea at the time he entered it." Appendix at 448. After Judge Franks granted Nara's petition and the Commonwealth appealed, Nara argued that he established his mental incompetency to plead guilty, articulated the test applied by both federal and state courts, and compared the facts of his case to *Com. v. Marshall*, 312 A.2d 6 (1973). Appendix at 885-87.

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[18] We turn to Nara's second petition for exhaustion purposes because he failed to "fairly present" his incompetency claim to the Superior Court following the first post-conviction proceeding. He did, however, present the claim throughout the proceedings following his second and third petitions.

When he again sought *allocatur*, Nara specifically raised "the invalidity of his plea," and, citing *Marshall*, stated that he "was mentally ill and incompetent to knowingly answer the plea court's questions." Appendix at 830. Nara consistently presented the basic factual outline of a federal claim. The Pennsylvania courts were not required to search beyond the pleadings and briefs for a federal issue. *Compare Baldwin v. Reese*, 541 U.S. 27 (2004), *and Bronshtein v. Horn*, 404 F.3d 700, 725-26 (3d Cir. 2005). We conclude Nara properly exhausted his incompetency claim.

B. Procedural Default

The procedural default doctrine prohibits federal courts from reviewing a state court decision involving a federal question if the state court decision is based on a rule of state law that is independent of the federal question and adequate to support the judgment. *Gray v. Netherland*, 518 U.S. 152, 162 (1996); *Coleman v. Thompson*, 501 U.S. 722, 732 (1991). A state rule provides an adequate and independent basis for precluding federal review if (1) the rule speaks in unmistakable terms; (2) all state appellate courts refused to review the petitioner's claims on the merits; and (3) their refusal was consistent with other decisions. *Bronshtein v. Horn*, 404 F.3d 700, 708 (3d Cir. 2005), *cert. denied*, *Beard v. Bronshtein*, 126 S.Ct. 1320 (2006); *Doctor v. Walters*, 96 F.3d 675, 683-84 (3d Cir. 1996). The Commonwealth bears the burden of demonstrating that Nara defaulted on his incompetency claim. *Netherland*, 518 U.S. at 166 (internal citations omitted). We agree with the District Court that the Commonwealth failed to carry its burden.

1. Former PA. R. CRIM. P. 321

Nara's first purported procedural default occurred when he failed to file a motion to challenge his guilty plea within ten days of entering it, pursuant to former PA. R. CRIM. P. 321. The Superior Court first noted this alleged waiver following his second PCRA proceeding. Appendix at 583. His third petition for relief was denied based upon PA. R. CRIM. P. 321. Pennsylvania courts, however, have consistently held rules of waiver inapplicable to incompetency claims. *Com. v. Brown*, 872 A.2d 1139, 1153 (Pa. 2005); *Com. v. Santiago*, 855 A.2d 682, 692 n.9 (Pa. 2004); *Com. v. Tyson*, 402 A.2d 995, 997 (Pa. 1979). Indeed, it would be contradictory to conclude that, regardless of his incompetency at the time of his guilty plea, Nara could competently waive his right to challenge his guilty plea just ten days later. *See Santiago*, 855 A.2d at 692, *and Com. v. Marshall*, 318 A.2d 724 (Pa. 1974) (citing *Pate v. Robinson*, 383 U.S. 375, 384 (1966)).

2. 42 PA. STAT. ANN. §9544(b)

Following his second petition, the Superior Court held that Nara waived his incompetency claim by failing to raise it in his first post-conviction petition pursuant to 42 PA. STAT. ANN. §9544(b). As we have noted, Nara did raise his incompetency claim in his first petition. Regardless, even after the enactment of the PCRA, Pennsylvania courts did not consistently bar successive post-conviction petitions – like Nara's – which allege prior counsel was ineffective. *See, e.g., Com. v. Allen*, 732 A.2d 582, 587 (Pa. 1999); *Com. v. Christy*, 656 A.2d 877, 881 (Pa. 1995); *Com. v. Cummings*, 619 A.2d 316, 318 (Pa.

Super. 1993); *Com. v. Dukeman*, 605 A.2d 418, 421 (Pa. Super. 1992); *see also Lambert v. Blackwell*, 134 F.3d 506, 522 n.27 (3d Cir. 1998) (noting Commonwealth acknowledged Pennsylvania courts will consider waived claims when raised under the rubric of ineffective assistance of counsel).

3. 42 PA. STAT. ANN. §9543(a)(3)

Finally, following his second petition, the Superior Court held that Nara was ineligible for post-conviction relief under 42 PA. STAT. ANN. §9543(a)(3). Section 9543(a)(3) bars post conviction relief unless a petitioner can show his claim was not previously litigated and was not waived. When Nara brought his second PCRA petition, his incompetency claim was not "previously litigated" because the Superior Court did not reach the merits. *Com. v. Morales*, 701 A.2d 516, 520 (Pa. 1997). His alleged waivers were subject to the exceptions described above. In any case, a petitioner can overcome failure to meet §9543(a)(3)'s requirements where he shows his prior counsel was ineffective, *Morales*, 701 A.2d at 520 (Pa. 1997) (citing *Com. v. Griffin*, 644 A.2d 1170 (Pa. 1994)), or makes "a strong *prima facie* showing that a miscarriage of justice may have occurred." *Hull v. Kyler*, 190 F.3d 88, 101 n.4 (3d Cir. 1999) (quoting *Com. v. Lawson*, 549 A.2d 107, 112 (Pa. 1988)).

Nara's incompetency claim was not procedurally defaulted, because Pennsylvania courts have frequently applied exceptions to his alleged waivers under former PA. R. CRIM. P. 321 and the PCRA. The Pennsylvania appellate courts' refusal to review his incompetency claim on the merits was not

consistent with Pennsylvania law. We therefore proceed to the merits of his claim.

C. Nara's Competency

1. Presumption of Correctness

The District Court accorded a presumption of correctness to the second PCRA court's determination that Nara was incompetent under 28 U.S.C. §2254(e)(1). Section 2254(e)(1) provides, in relevant part:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C.A. §2254(e)(1) (2006); *Demosthenes v. Baal*, 495 U.S. 731, 735 (1990) (*per curiam*) (cited in *Michael v. Horn*, 459 F.3d 411, 414 n.3 (3d Cir. 2006)); *White v. Horn*, 112 F.3d 105, 112 n.7 (3d Cir. 1997). A state trial court's determination of an individual's competency is entitled to a presumption of correctness. *Smith v. Freeman*, 892 F.2d 331, 341 (3d Cir. 1989) (citing *Maggio v. Fulford*, 462 U.S. 111, 117 (1983) (*per curiam*), and *Sumner v. Mata*, 449 U.S. 539, 546-47 (1981)); *see also Miller v. Fenton*, 474 U.S. 104 (1985).

The Commonwealth argues the District Court should not have applied the presumption of correctness to the second PCRA court's findings because there was no "adjudication on the merits" of Nara's incompetency claim. We disagree. First, the §2254(e)(1) presumption of correctness applies regardless of whether there has been an "adjudication on the merits" for purposes of §2254(d). *Appel v. Horn*, 250 F.3d 203, 210 (3d Cir. 2001). Second, during the second PCRA proceeding, Judge Franks plainly *did* reach the merits of Nara's incompetency claim: he reviewed the lengthy plea colloquy transcript, held two days of evidentiary hearings on the claim, observed expert witness testimony and cross-examination, identified and applied the correct legal principle, and specifically concluded Nara was incompetent when he pleaded guilty. *Compare Albrecht v. Horn*, 471 F.3d 435, 446 (3d Cir. 2006) (stating that identification and purported application of the correct legal principle constitutes an "adjudication on the merits" for purposes of AEDPA).

Finally, there is a "familiar and compelling" justification for according presumptive weight to Judge Franks' determination. *Miller v. Fenton*, 474 U.S. 104, 114 (1985). It is a well-established principle of federal law that state trial judges deserve substantial deference.

> Face to face with the living witnesses, the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases, the exercise of his power of observation often proves the most accurate method of ascertaining the

> truth...how can we say he is wrong? We never saw the witnesses.

Boyd v. Boyd, 169 N.E. 632, 634 (N.Y. 1930) (quoted in *Oregon Medical Society*, 343 U.S. 326, 339 (1952), *Maggio*, 462 U.S. at 117, *and Marshall v. Lonberger*, 459 U.S. 422, 434 (1983)).This principle is particularly relevant here, because witness credibility and demeanor are crucial to resolving an individual's competency. *Fenton*, 474 U.S. at 116 -17 (citing *Maggio*, 462 U.S. at 117). A retrospective competency examination at this stage – over twenty years later – would pose considerable difficulties for a federal habeas court. *Drope v. Missouri*, 420 U.S. 162 (1975). Judge Franks, a learned colleague of a coordinate court, was in a unique position from which he could carefully assess witness credibility and demeanor in open court against his extensive experience with the case. Even six years after the plea colloquy, he was in a position "far superior to that of federal judges reviewing an application for a writ of habeas corpus." *Fenton*, 474 U.S. at 114.

The Commonwealth contends the District Court should not have relied upon the second PCRA court's factual findings because the Pennsylvania Superior Court vacated the court's decision. When an appellate court vacates a lower court's order, it renders the lower court's order null and void. *United States v. Ayres*, 76 U.S. 608, 609 (1869); *Allegheny County v. Maryland Cas. Co.*, 132 F.2d 894, 896 (3d Cir. 1943); *Kuppel v. Auman*, 529 A.2d 29, 31 (Pa. Super. 1987) (citing *McGine v. State Mut. Ben. Soc.*, 4 A.2d 537, 538 (Pa. Super. 1939)). However, a state court's factual determination may be given effect even if its order has been rendered a nullity on other

grounds. *Dickerson v. Vaughn*, 90 F.3d 87, 90-91 (3d Cir. 1996) (Weis, J.) (Superior Court's factual determination entitled to deference where reversal order by the Pennsylvania Supreme Court left factual determination undisturbed); *see also Lambert v. Blackwell*, 387 F.3d 210, 236-40 (3d Cir. 2004) (deferring to state courts' factual findings despite concluding that state courts lacked jurisdiction under Pennsylvania law); *Pursell v. Horn*, 187 F.Supp.2d 260, 292, 308-12 (W.D.Pa. 2002) (according deference to PCRA court's factual findings where state appellate court found PCRA court lacked jurisdiction); *Com. v. Pate*, 617 A.2d 754, 760 (Pa. Super. 1992). The Commonwealth acknowledges a state PCRA trial court's factual findings merit deference unless a state appellate court invalidates those findings. Here, Judge Franks' determination that Nara was incompetent was left undisturbed by the Pennsylvania Superior Court, the Pennsylvania Supreme Court, and by Judge Franks himself during the third post-conviction proceeding. We find no plain error in the District Court's conclusion that a presumption of correctness applied to Judge Franks' competency determination.

2. Rebuttal of the Presumption

Application of the presumption of correctness raises the question of whether the federal habeas statute allows the Commonwealth to rebut the presumption. The statute provides habeas applicants an opportunity to challenge a state court's factual determination by "clear and convincing evidence." 28 U.S.C.A. §2254(e)(1) (2006). It is silent as to whether a state can rebut the presumption. Generally, where a statute authorizes a designated party to take specific

action, it is inappropriate to presume that a party not so designated may also take it. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6-7 (2003). At the same time, we recognize that denying the Commonwealth any opportunity to contest Judge Franks' determination would seem to conflict with the overall design of the federal habeas statute. We decline to decide this question, because the record here confirms that the Commonwealth's attempt to rebut would fail.

As stated *supra*, the standard for competency to plead guilty is whether the criminal defendant was able to consult with his lawyer with a reasonable degree of rational understanding and whether he had a rational understanding of the nature and object of the proceedings against him. *Godinez*, 509 U.S. at 396; *United States v. Cole*, 813 F.2d 43, 46 (3d Cir. 1987); *United States ex rel. McGough v. Hewitt*, 528 F.2d 339, 342 n.2 (3d Cir. 1975). Ordinarily, a defendant's competency to plead guilty may be established during the plea colloquy, and a competency determination is necessary only when the court has reason to doubt the defendant's competency. *Godinez*, 509 U.S. at 402 n.13.

Under Pennsylvania law, a guilty plea may nonetheless be withdrawn, after a sentence has been imposed, on a showing of manifest injustice. *Com. v. Leidig*, 850 A.2d 743, 746 (Pa. Super. 2004); *Com. v. Muhammad*, 794 A.2d 378 (Pa. Super. 2002). A prisoner may show his plea resulted in manifest injustice if he establishes he entered it involuntarily, unknowingly or unintelligently. *Leidig*, 850 A.2d. at 746; *Muhammad*, 794 A.2d at 383. To ascertain whether a plea was given voluntarily, knowingly and

intelligently, the court must examine the plea colloquy and the totality of the circumstances surrounding the entry of the plea. *Com. v. Gribble*, 863 A.2d 455, 474 n.16 (Pa. 2004) (stating, "when a collateral attack is leveled against a record waiver, it is the totality of the circumstances, and not the record waiver or plea colloquy, which controls."); *Muhammad*, 794 A.2d at 383-84 (citing *Com. v. Lewis*, 708 A.2d 497, 501 (Pa. Super. 1998)).

During his plea colloquy, Nara repeatedly indicated he understood what was transpiring. *See, e.g.*, Appendix at 112, 120, 124. The "totality of the circumstances," reflected in Nara's medical records and Dr. Harika's testimony, however, suggests otherwise. Nara's medical records indicate he was hospitalized and medicated[19] at state mental health institutions following suicide attempts both before his arrest and shortly after his sentencing, but was apparently left untreated during the intervening months. Indeed, his condition during the four months prior to the plea colloquy, and during the weeks prior to sentencing, is entirely undocumented.

Dr. Harika's expert testimony provided essential insight into Nara's mental state during this undocumented period. Dr. Harika analyzed Nara's medical records and his statements at the plea colloquy, and testified that Nara's condition steadily worsened such that he was "psychotic" and "out of

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[19] Nara was treated with several anti-depressants and tranquilizers used to treat schizophrenia before the murders and throughout the two years after his sentencing.

touch with reality" when he pleaded guilty. The Commonwealth failed to rebut his testimony, and has not presented any additional evidence to contradict Harika's testimony in subsequent proceedings. Finally, we again emphasize the fact that Judge Franks, who conducted an 85- minute colloquy with Nara and held hearings during three separate post-conviction proceedings, ultimately found Nara was incompetent when he pleaded guilty and never reversed this finding. We find no plain error in the District Court's conclusion that Nara was incompetent when he pleaded guilty.[20]

V. Conclusion

In sum, because the Commonwealth failed to timely object to the Magistrate Judge's R&R, we have reviewed the R&R, as adopted by the District Court, for plain error.

We find no plain error in the District Court's conclusion that Nara "fairly presented" his incompetency claim to each level of the Pennsylvania judiciary. Nor did it err by according a presumption of correctness to Judge Franks' competency determination. Finally, we find no plain error in the

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[20]Even if we were to find an obvious error on the part of the District Court, the Commonwealth has failed to show that any such error has "seriously affected the fairness, integrity or public reputation of judicial proceedings." The Commonwealth had a full opportunity to challenge Dr. Harika's testimony during the second PCRA proceeding, and it has been afforded a full and fair opportunity to pursue its arguments.

District Court's conclusion that Nara's guilty pleas were accepted in violation of due process.

We will affirm the District Court's order.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-4779

JOSEPH NARA

v.

FREDERICK FRANK,

Appellant

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 99-cv-00005)
District Judge: The Honorable Terrence F. McVerry

ARGUED OCTOBER 26, 2006

BEFORE: SMITH, WEIS, and NYGAARD, Circuit Judges.

This case came to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel on October 26, 2006.

On consideration whereof, it is now here ORDERED AND ADJUDGED by this Court that the order of the said

District Court entered on September 27, 2005,be, and the same is hereby AFFIRMED.

All of the above in accordance with the opinion of this Court.

ATTEST:

/S/ Marcia M. Waldron
Clerk

Date: May 8, 2007

Certified as a true copy and issued in lieu of a formal mandate on July 17, 2007

Teste: *Marcia M. Waldron*

Clerk, U.S. Court of Appeals for the Third Circuit

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOSEPH GEORGE NARA, #7667 Petitioner,	)
v.	) Civil Action No. 99-5
	) Judge McVerry
FREDERICK FRANK, *et al.* Respondent	) Magistrate Ciazza

MEMORANDUM ORDER

Joseph George Nara's Petition for Writ of Habeas Corpus was received by the Clerk of Court on January 4, 1999, and was referred to United States Magistrate Judge Francis X. Caiazza for a Report and Recommendation in accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1), and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrates.

The Magistrate Judge's Report and Recommendation, filed on September 1, 2005, recommended that the Petition for Writ of Habeas Corpus filed by Joseph George Nara be granted to the

extent that he be permitted to withdraw his guilty pleas. Furthermore, it was recommended that the Commonwealth of Pennsylvania be directed to commence trial within one-hundred and twenty days measuring from the date of the entry of the Memorandum Order. The parties were allowed ten (10) days from the date of service to file objections. Service was made on the Petitioner by First Class United States Mail and on the Respondents. No objections have been filed. After review of the pleadings and documents in the case, together with the Report and Recommendation, the following order is entered:

AND NOW, this 27th day of September, 2005; IT IS HEREBY ORDERED that the Petition for Writ of Habeas Corpus filed by Joseph George Nara is GRANTED and that he be permitted to withdraw his guilty pleas. IT IS FURTHER ORDERED that the

execution of the Writ of Habeas Corpus is STAYED for one-hundred and twenty (120) days from the date of this Order, during which time the Commonwealth of Pennsylvania is directed to commence the trial of the Petitioner Joseph George Nara. After 120 days, should the Commonwealth of Pennsylvania not commence the trial of the Petitioner, the Commonwealth shall release the Joseph George Nara from custody.[1] If either party files an appeal of this Memorandum Order to the United States Court of

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[1] 1. *See* Carpenter v. Vaughn, 296 F.3d 138, 159-160 (3d Cir. 2002) (remanding for the grant of habeas corpus relief, unless, within a time to be set by the District Court, a new penalty phase trial is held or until the petitioner is resentenced to a term of life imprisonment); Frey v. Fulcomer, 132 F.3d 916, 925 (3d Cir. 1997) (remanding to district court with instructions to grant the writ of habeas corpus conditionally, with the proviso that the Commonwealth of Pennsylvania conduct a new sentencing hearing within 120 days), *cert. denied*, 524 U.S. 911 (1988).

Appeals for the Third Circuit, all provisions of this Order shall be STAYED pending such appeal.

Finally, the Report and Recommendation of Magistrate Judge Francis X. Caiazza, dated September 1, 2005, is adopted as the opinion of the District Court.

The Clerk of Court is directed to close this case.

BY THE COURT:

September 27, 2005

s/ Terrence F. McVerry
U.S. District Court Judge

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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF *PENNSYLVANIA*

JOSEPH GEORGE NARA, Petitioner,	) Civil Action No. 99-5
v.	) Judge McVerry) Magistrate Judge) Caiazza
FREDERICK FRANK, Superintendent, Respondent.	)

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. RECOMMENDATION

It is respectfully recommended that the Petition for Writ of Habeas Corpus filed by Joseph George Nara be granted to the extent that he be permitted to withdraw his guilty pleas. Furthermore, it is recommended that the Commonwealth of Pennsylvania be directed to commence trial within one-hundred and twenty days.

II. REPORT

The Petitioner, Joseph George Nara ("the Petitioner" or "Nara"), a prisoner presently incarcerated at the State Correctional Institution at Huntingdon, Pennsylvania, filed a Petition for Writ of Habeas Corpus ("the Petition") pursuant to the provisions of 28 U.S.C. § 2254. He now challenges his guilty pleas to two counts of Murder in the First Degree. Stated generally, Nara asserts that he was incompetent to plead guilty and, therefore, his pleas were entered involuntarily.

A. Relevant Factual and Procedural History

On June 20, 1984, in the Court of Common Pleas of Fayette County, Pennsylvania, Nara pleaded guilty to two counts of Murder in the First Degree with respect to the shooting deaths of his wife and mother-in-law. The relevant events surrounding this family tragedy follow.

On December 3, 1983, the Petitioner's wife left him after apparently subjecting him to considerable mental anguish. Parcel to his mental state, Nara claims that she was engaging in extramarital affairs with other men.[1] Because of the marital discord, Nara consulted with the Fayette County Mental Health Clinic on January 9, 1984. At that time Nara and his wife were separated but they briefly reconciled from January 14 through January 17, 1984, when she asked him to again leave their common residence. Next, on January 18, 1984, Nara attempted suicide by taking an overdose of Unisom tablets and he was then committed to the Connellsville State General Hospital.[2] While there, he was diagnosed with a mental disorder and he was discharged on January

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[1] Doc. 87, Ex. FF, Mayview Hospital Discharge Summary Report, February 17, 1984.

[2] Doc. 87.

23, 1984, with instructions to seek follow- up treatment at the Fayette County Mental Health Center.

Five days later, on the evening of January 28, 1984, Nara telephoned his wife and informed her he was leaving town and that he wanted to first visit with his children.[3] An argument ensued and during the course of their animated conversation Nara informed his wife that Pennsylvania State Trooper Maharowski had a warrant for her arrest. In response, she purportedly told Nara that she was unconcerned because she was in the midst of an affair with Officer Maharowski. Apparently infuriated, Nara immediately proceeded to his wife's residence where he was met at the door by his wife's mother, who aimed a shotgun at his face. Nara retreated to his car, retrieved a 45-caliber handgun he had

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[3] Doc. 87.

previously loaded and had placed in his car two days earlier, returned to the residence, forced his way inside and then shot his wife and mother-in-law. They both died from the wounds they sustained as a result of the shootings.

Nara then fled.

The day after the murders, Nara telephoned his family several times from a motel somewhere in North Carolina. He also contacted the Pennsylvania State Police and allegedly made several admissions with respect to the two murders. Shortly thereafter, Nara was arrested in North Carolina and –after waiving extradition- was returned to Pennsylvania and charged with two counts of homicide for the deaths of his wife and his mother-in-law. He was subsequently confined in the Fayette County Prison.

On February 9, 1984, Nara's attorney, Charles C. Gentile, Esq., filed a Petition for Mental

Examination, seeking a psychiatric examination and/or a commitment to a mental institution under the Pennsylvania Mental Health and Mental Retardation Act. *See* 50 Pa. Cons. Stat. Ann. § 4408. On February 13, 1984, Nara was admitted to the Mayview State Hospital for a period not to exceed sixty days. *See id.*, § 4408(c). He was housed there for only four days and subsequently was returned to the Fayette County Prison on February 17, 1984, because he attempted to solicit the assistance of other patients to effectuate an escape. His apparent plan was to kidnap a female staff employee or student nurse and then hold her as a hostage.[4] Lillian L. Meyers, Ph.D., who was the Director of the Regional Psychiatric Forensic Unit, contacted the state Judge who committed Nara and recommended that he be returned to the Fayette County Prison -after

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[4] Doc. 87, Ex. FF, Discharge Report.

concluding that Nara did not appear to be mentally ill or in need of treatment.

Next, on June 20, 1984, before the Honorable William J. Franks, Nara pleaded guilty to two counts of Murder in the First Degree as part of a plea agreement. On July 13, Judge Franks sentenced Nara to two concurrent terms of life imprisonment. Nara did not file any post-verdict motions nor did he file a direct appeal to the Pennsylvania Superior Court. Subsequently, Nara was transferred to the State Correctional Institution at Pittsburgh ("SCIP").

Shortly after his arrival at SCIP, Nara was placed in the institutional hospital for psychiatric purposes and prison personnel then initiated a proceeding seeking Nara's involuntary commitment to a state mental facility.[5] On September 10, 1984 Nara was transferred to Farview State Hospital. He

[5] Doc. 87, Ex. LL.

remained there until mid November 1984 and was then returned to SCIP. While at SCIP Nara was transferred to the psychiatric department of the institutional hospital because he attempted suicide. Once again - on February 19, 1985- Nara attempted to commit suicide by ingesting an overdose of Benadryl and Serentil. As a result, prison authorities petitioned to have Nara involuntarily committed to a state mental facility, again based on the examining physician's opinion that Nara was severely mentally disabled and in need of treatment.[6] On March 1, 1985, the Court granted the petition and Nara was again committed to Farview on March 12, 1985. On April 11, 1985, he was examined by Dr. Jane E. Perrine who concluded that Nara was incompetent due to his

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[6] Doc. 87, Ex. MM.

marked depression.[7] He remained a patient at Farview until July 22, 1986.

On April 25, 1988, Nara filed a petition for relief pursuant to the newly enacted Pennsylvania Post-Conviction Relief Act ("PCRA"). *See* 42 Pa. Cons. Stat. §§ 9541, *et. seq.* (effective date April 13, 1988). In his petition, Nara raised an ineffective assistance of counsel claim. By Opinion and Order dated October 17, 1988, the PCRA court denied Nara's petition for post- conviction relief.[8] Nara filed a timely appeal to the Pennsylvania Superior Court. By Order dated March 29, 1989, the Superior Court affirmed the Order of the PCRA court and dismissed Nara's appeal.[9] The Pennsylvania Supreme Court denied

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[7] Doc. 87, Ex. NN.

[8] Doc. 87, Ex. UU.

[9] Doc. 87, Ex. WW.

Nara's Petition for Allowance of Appeal by Order dated September 21, 1989.[10]

On May 15, 1990, Nara filed a second PCRA petition wherein he sought to withdraw his guilty pleas based on a claim of mental incompetency. Hearings were held on June 27, 1990, and November 19, 1990. At the hearing, Dr. Jobindar Harika –along with Nara -presented testimony with respect to the Petitioner's incompetency at the time that he entered his guilty plea; the Commonwealth chose not to present any testimony in rebuttal. By Order dated January 30, 1991, the PCRA court granted the relief which Nara sought in his petition and directed that his guilty pleas be withdrawn.[11] Following an appeal by the Commonwealth, the Pennsylvania Superior Court vacated the Order of the PCRA court on April

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[10] Doc. 88, Ex. CCC.

[11] Doc. 88, Ex. CCC.

30, 1992, and reinstated Nara's guilty pleas, finding that the issue of Nara's competence had been waived because he had failed to raise it in his first post-conviction petition.[12] The Pennsylvania Supreme Court denied Nara's Petition for Allowance of Appeal by Order dated October 7, 1992. Subsequently, the United States Supreme Court denied Nara's petition for *certiorari*.

On December 21, 1995, Nara filed a third PCRA petition, alleging that he was incompetent at the time he entered his guilty plea. The court appointed attorney Phyllis Jin to represent Nara and then scheduled a hearing for April 30, 1996. At the hearing, Nara's counsel asked to withdraw his third PCRA petition because the issue he raised was "previously litigated" in favor of filing a motion to withdraw his guilty plea *nunc pro tunc* pursuant to

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[12] Doc. 88, Ex. DDD.

Pennsylvania Rule of Criminal Procedure 321.The Court granted Nara's motion and issued a briefing schedule. On June 23, 1996, Attorney Jin filed a memorandum in support of Nara's motion to withdraw his guilty plea. By Opinion and Order dated September 30, 1996, the Court of Common Pleas of Fayette County denied Nara's motion to withdraw his pleas, concluding that Nara had been advised at his sentencing hearing in 1984 of his right to move to withdraw the pleas within ten days.[13] In addition, without acknowledging the fact that Nara was hospitalized for a substantial amount of time -and had been diligently litigating his claims since 1988- the court found that Nara failed to state a compelling reason which explained his decision to wait twelve years before he sought to withdraw his guilty pleas. By Memorandum Opinion and Order dated July 9,

[13] Doc. 88, ex. LLL.

1997, the Superior Court affirmed the trial court's decision which denied Nara's motion to withdraw his guilty pleas.[14] Finally, by Order dated December 8, 1997, the Pennsylvania Supreme Court denied Nara's Petition for Allowance of Appeal.

On or about January 4, 1999, this Court received Nara's federal habeas corpus petition. The District Court referred the case to Magistrate Judge Francis X. Caiazza, who recommended that Nara's petition be dismissed because it was untimely filed and that a certificate of appealability likewise be denied. The District Court adopted the Magistrate Judge's Recommendations, dismissed Nara's federal habeas petition as being filed untimely and likewise denied the certificate of appealability.

Nara filed a timely appeal to the Court of Appeals for the Third Circuit. On August 30, 2001,

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[14] Doc. 88, Ex. NNN

the Court of Appeals issued a written opinion in Nara v. Frank, 264 F.3d 310, 319-20 (3d Cir. 2001), *overruled in part by* Carey v. Saffold, 536 U.S. 214 (2002). Specifically, the Court of Appeals agreed with the District Court that Nara's petition was commenced untimely under the provisions of 28 U.S.C. § 2244(d). Notwithstanding, the Third Circuit Court vacated the dismissal of the habeas petition as being filed untimely and remanded it to the District Court with directions to conduct an evidentiary hearing to determine whether the circumstances warranted the equitable tolling of the limitations period.

Specifically, the Court of Appeals ordered the District Court to conduct an evidentiary hearing based on Nara's assertions with respect to two issues: 1) whether he suffered from mental health problems at the time that he entered his guilty plea, and 2)

whether his attorney in the third PCRA proceeding effectively abandoned him and prevented him from filing a timely federal habeas petition. The District Court held evidentiary hearings on October 31, 2002 and January 28, 2003. The evidence adduced at the hearings, as well as the clarification of the law as set out by the Court of Appeals for the Third Circuit after its decision in Nara in 1999, required this Court to conclude that the doctrine of equitable tolling was applicable to Nara's case. Consequently, Nara's federal habeas petition was considered to have been timely filed under the doctrine of equitable tolling. *See* Nara v. Frank, 2004 WL 825858 (W.D. Pa. Mar. 10, 2004) (Civil Action No. 99-5).

B. Exhaustion Requirement

The provisions of the federal habeas corpus statute at 28 U.S.C. § 2254(b) require a state prisoner to exhaust his or her available state court remedies

before seeking federal habeas corpus relief. To comply with the exhaustion requirement, a state prisoner first must have fairly presented his or her constitutional and federal law issues to the state courts through direct appeal, collateral review, state *habeas* proceedings, *mandamus* proceedings, or other available procedures for judicial review. *See, e.g.*, Castille v. Peoples, 489 U.S. 346, 351 (1989); Doctor v. Walters, 96 F.3d 675, 678 (3d Cir. 1996); Burkett v. Love, 89 F.3d 135, 137 (3d Cir. 1996). Moreover, a petitioner must present every claim raised in the federal petition to the state's trial court, intermediate appellate court and highest court before exhaustion will be considered satisfied. *See* Orban v. Vaughn, 123 F.3d 727, 730 (3d Cir. 1997), *cert. denied*, 522 U.S. 1059 (1998). The petitioner has the burden of establishing that exhaustion has been satisfied. *See*

Ross v. Petsock, 868 F.2d 639, 643 (3d Cir. 1989); O'Halloran v. Ryan, 835 F.2d 506, 508 (3d Cir. 1987).

Exhaustion is not a jurisdictional limitation, however, and federal courts may review the merits of a state petitioner's claims prior to exhaustion when no appropriate state remedy exists. *See* Christy v. Horn, 115 F.3d 201, 206 (3d Cir. 1997); Doctor, 96 F.3d at 681; Carter v. Vaughn, 62 F.3d 591, 594 (3d Cir. 1995).[15] A petitioner shall not be deemed to have exhausted state remedies, however, if he or she has the right to raise his or her claims by any available state procedure. *See* 28 U.S.C. § 2254[(c)].

C. Procedural Default Doctrine

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[15]In addition, the amended Habeas Corpus Statute provides that a federal court may deny a petitioner's claims on the merits notwithstanding a petitioner's failure to comply with the exhaustion requirement. *See* 28 U.S.C. § 2254(b)(2) (as amended by The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 142 Cong. Rec. H3305-01 (1996).

Beyond questions of exhaustion, a federal court may be precluded from reviewing claims under the procedural default doctrine. *See* Gray v. Netherland, 518 U.S. 152 (1996); Coleman v. Thompson, 501 U.S. 722, 732 (1991); Doctor, 96 F.3d at 678; Sistrunk v. Vaughn, 96 F.3d 666, 678 (3d Cir. 1996). Similar to the exhaustion requirement, the procedural default doctrine was developed to promote our dual judicial system. It is based upon the "independent and adequate state law grounds" doctrine, which dictates that federal courts will not review a state court decision involving a question of federal law if the state court decision is based on state law that is "independent" of the federal question and "adequate" to support the judgment. *See* Coleman, 501 U.S. at 750.

A state's procedural rules are entitled to deference by federal courts; a petitioner's violation of

a state procedural rule may constitute an independent and adequate state law ground for denial of federal review of habeas claims under the procedural default doctrine. *See id.* and Sistrunk, 96 F.3d at 673. Moreover, violations of a state's procedural rules may constitute an independent and adequate state ground sufficient to invoke the procedural default doctrine, even where no state court explicitly has concluded that a petitioner is procedurally barred from raising his or her claims. *See* Glass v. Vaughn, 65 F.3d 13, 15 (3d Cir. 1995), *cert. denied*, 516 U.S. 1151 (1996); Carter, 62 F.3d at 595. A petitioner whose constitutional claims have not been addressed on the merits due to procedural default can overcome the default, thereby allowing federal court review, if he or she can demonstrate either: 1) "cause" for the default *and* "actual prejudice" as a result of the alleged violation of

federal law; or 2) a failure to consider the claims will result in a "fundamental miscarriage of justice." *See* Coleman, 501 U.S. at 750; Carter, 62 F.3d at 595.

The Respondent, who has the burden of proof, asserts that Nara has procedurally defaulted his competency claim. *See* Oelsner v. United States, 60 Fed. Appx. 412, 415, 2003 WL 1564255, *2 (3d Cir. Mar. 27, 2003) ("Where the government asserts an affirmative defense of procedural default, it bears the burden of proof.") (citing Bennett v. Mueller, 296 F.3d 752, 762 (9th Cir. 2002) ("[T]here is good reason to place the burden of proving adequacy on the state, the most obvious of which is that procedural default is an affirmative defense.") and Hooks v. Ward, 184 F.3d 1206, 1216-17 (10th Cir. 1999) ("[T]he state is undoubtedly in a better position to establish the regularity, consistency, and efficiency with which it has applied [its procedural bar] than are habeas

petitioners, who often appear *pro se*, to prove the converse."). *See also* Trest v. Cain, 522 U.S. 87, 89 (1997) (quoting Gray v. Netherland, 518 U.S. 152, 166 (1996))("Thus, procedural default is normally a 'defense' that the state is 'obligated to raise' and 'preserve' if it is not to 'lose the right to assert that defense thereafter.'"). The discussion set out *infra* reveals that the Respondent has not satisfied its burden of showing that Nara's federal habeas petition is barred by the procedural default doctrine.

1. "Fair Presentation"

First, the Respondent asserts that Nara failed to exhaust his competency claim because he did not fairly present it as a constitutional issue in the state courts. To meet the fair presentation criterion, the same factual and legal basis for a claim must be presented to the state court in order to provide it with a reasonable opportunity to address the claim and

correct any violation of federal rights. *See* Duncan v. Henry, 513 U.S. 364, 366 (1995) (*per curiam*). "Fair presentation requires that, before a particular claim may be asserted in federal court, the same method of analysis must have been made available to the state court." *See* Chaussard v. Fulcomer, 816 F.2d 925, 928 (3d Cir.), *cert. denied*, 484 U.S. 845 (1987).

Nara claims that he was incompetent to plead guilty in 1984 and that his counsel rendered ineffective assistance by failing to request a competency evaluation. In that respect, "it is well established that the Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial." *See* Medina v. California, 505 U.S. 437, 439 (1992) (citing Drope v. Missouri, 420 U.S. 162 (1975); *see also* Cooper v. Oklahoma, 517 U.S. 348 1996):

> Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so.

Cooper, 517 U.S. at 354 (internal citations and quotations omitted). "Indeed, the right not to stand trial while incompetent is sufficiently important to merit protection even if the defendant has failed to make a timely request for a competency determination." *See id.* at 354, n.4 (citing Pate v. Robinson, 383 U.S. 375, 384 (1966)). The standard for competence to stand trial is whether the defendant has the "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and whether he has "a rational as well as factual understanding of the proceedings against him." *See* Dusky v. United States, 362 U.S.

402 (1960) (*per curiam*) (internal quotation omitted). The competency standard for pleading guilty and waiving the right to counsel is the same as the test for competency to stand trial. *See* Godinez v. Moran, 509 U.S. 389, 396 (1993).

Nara claims that he was incompetent at the time he entered his guilty pleas. A criminal defendant may not waive a fundamental constitutional right unless he or she proceeds "competently and intelligently." *See* Johnson v. Zerbst, 304 U.S. 458, 468 (1938). The Supreme Court repeatedly has held that, as with any waiver of a constitutional right, the Due Process Clause of the United States Constitution requires that a guilty plea be made "knowingly, voluntarily and intelligently." *See* Boykin v. Alabama, 395 U.S. 238 (1969). The constitutional standard raises this question: whether the plea represents a voluntary and intelligent choice among the

alternative courses of action open to the defendant. *See* Boykin, 395 at 243. To determine whether a guilty plea represents a voluntary and intelligent choice, a reviewing court must examine the totality of the circumstances surrounding the plea. *See* Brady v. United States, 397 U.S. 742, 749 (1970). A plea is involuntary if it is the product of threats, improper promises, or other forms of wrongful coercion. *See* Brady, 397 U.S. at 754-55. A plea is unintelligent if the defendant has insufficient information to properly assess the advantages and disadvantages of a trial when placed in juxtaposition with a guilty plea. *See* Hill v. Lockhart, 474 U.S. 52, 56 (1985). That all being said, the Constitution requires that before accepting a guilty plea, a court must determine whether the defendant is competent to enter a plea and whether the plea is knowing and voluntary. *See* Godinez v. Moran, 509 U.S. 389, 396-400 (1993).

In order to exhaust this claim, Nara must have "fairly presented" it to all three levels of the Pennsylvania state courts. With respect to this issue, the Court of Appeals for the Third Circuit has set out the test that follows:

> To fairly present a claim, a petitioner must present a federal claim's factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted . . . . It is not sufficient that a somewhat similar state-law claim was made . . . . Yet, the petitioner need not have cited "book and verse of the federal constitution . . . .

See McCandless v. Vaughn, 172 F.3d 255, 261-62 (3d Cir. 1999)(internal citations and quotations omitted). Nara raised an incompetency claim in his second PCRA Petition by asserting that his pleas were not knowingly and intelligently entered because he was incompetent at the time he pleaded guilty. *See* Doc. 88, PCRA Hr'g Tr. at 4-8, Ex. AAA. Following hearings, the state PCRA court granted Nara relief,

finding that he was incompetent to plead guilty; essentially, the PCRA court found that Nara's guilty pleas were not intelligently entered. The Commonwealth appealed the decision of the PCRA court and in his brief filed in the Pennsylvania Superior Court, Nara argued that he had "established his mental incompetence to knowingly and intelligently enter his guilty pleas." *See* Doc. 5, Commw. Ex. 12 at 6. The pertinent parts of Nara's argument follow:

> A plea entered by a defendant without the mental capacity to understand his position is not a knowingly and intelligently entered plea . . . . The test for determining a person's mental competency to enter a guilty plea is whether he had sufficient ability at the pertinent time to consult with his lawyer with a reasonable degree of rational understanding, and have a rational as well as a factual understanding of the proceedings against him . . . .

See Doc. 5, Superior Ct. Br. at 9-10, Commw. Ex. 12.

In Commonwealth v. Marshall, 454 Pa. 413 (1973), a

case relied on by Nara, the Pennsylvania Supreme Court cited its opinion in the case of Commonwealth v. Harris which sets out the relevant test for determining whether a defendant was competent to enter a guilty plea. *See* Commonwealth v. Harris, 431 Pa. 114, 117 (1968). In Harris the Supreme Court of Pennsylvania described the test in the manner which follows:

> [Did the defendant] have sufficient ability at the pertinent time to consult with his lawyers with a reasonable degree of rational understanding, and have a rational as well as factual understanding of the proceedings against him.

See Harris, 431 Pa. at 117 (citations omitted). Due process requires that to be competent to plead guilty, a defendant must have had a "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and [that he had] a rational as well as factual understanding of the

proceedings against him." *See* Godinez, 509 U.S. at 398. The authority cited in Nara's brief clearly shows that he raised a constitutional claim with respect to his guilty pleas; *i.e.*, that he was incompetent at the time he entered his guilty pleas. That said, there is no basis for the Respondent's assertion that Nara did not fairly present his incompetency argument as a federal claim. He relied on state cases employing the correct constitutional analyses and presented his claim in specific terms that directly pointed to a right protected by the Constitution. Consequently, the Respondent's assertion that Nara failed to exhaust his competency claim because he did not fairly present that issue to the Pennsylvania state courts is patently without merit. *Accord* Bisaccia v. Attorney General of the State of New Jersey, 623 F.2d 307, 312 (3d Cir.) (concluding that "[b]ecause the substance of the appellant's state claim is virtually

indistinguishable from the due process allegation now before the federal court, and because the method of analysis is indistinct,. . . exhaustion of state remedies has been met"), *cert. denied*, 449 U.S. 1042 (1980).

2. Independent and Adequate State Law Ground

The Respondent next argues that Nara procedurally defaulted his incompetency claim through waiver because he failed to file a motion to withdraw his plea within ten days after it was entered. *See* Pa. R. Crim. Proc. 321 (now repealed). The Respondent also argues that Nara failed to include the claim in his first PCRA Petition. Both of these assertions, however, are legally without merit because neither rule provides an adequate state law basis to support a procedural default of Nara's claim. With respect to this issue the Court of Appeals for the Third Circuit has stated that:

> [a] state rule provides an independent and adequate basis for precluding federal review of a state prisoner's

> habeas claims only if: (1) the state procedural rule speaks in unmistakable terms; (2) all state appellate courts refused to review the petitioner's claims on the merits; and (3) the state courts' refusal . . . is consistent with other decisions.

See Johnson v. Pinchak, 392 F.3d 551, 558-559 (3d Cir. 2004)(citations omitted).

a. Former Pennsylvania Rule Criminal Procedure 321

In his third PCRA proceeding, the Pennsylvania courts held that Nara's competency claim was waived because he failed to timely file a motion to withdraw his guilty pleas. *See* Pa. R. Crim. Proc. 321 (now repealed). Former Rule 321 provided that a defendant who had pleaded guilty and sought to challenge the validity of the plea must proceed by a written motion, which must be filed with the trial court within ten days after the imposition of sentence.

See id. If the defendant failed to file a motion within the ten-day time period, the issue was waived - provided that the trial court informed the defendant of his or her right to file post-verdict motions or a motion to withdraw the guilty plea. *See* Commonwealth v. Cavanaugh, 500 Pa. 313, 315, 456 A.2d 145, 147 (1983). In order for Nara's competency claim to be procedurally defaulted, the Pennsylvania courts must have consistently and regularly applied the waiver rule to clams of mental incompetency associated with either guilty pleas or a defendant's ability to proceed to trial. *See* Doctor v. Walters, 96 F.3d 675, 684 (3d Cir. 1996)(quoting and citing Georgia v. Ford, 498 U.S. 411, 423-24 (1991))("Therefore we must examine the case law to determine whether the rule relied upon by the Superior Court . . . was 'firmly established and regularly applied.'").

As early as 1974, the Pennsylvania courts consistently have held that the issue of whether a defendant was competent to stand trial is an exception to the waiver rule in cases before the court on direct appeal. *See* Commonwealth v. Brown, 872 A.2d 1139, 1153 (Pa. 2005) (citing Commonwealth v. Tyson, 485 Pa. 344, 349, 402 A.2d 995, 997 (1979) ("when the issue presented is whether a person was competent to stand trial, the waiver rule is not applicable."); Commonwealth v. Silo, 469 Pa. 40, 364 A.2d 893 (1976); Commonwealth v. Marshall, 456 Pa. 313, 318 A.2d 724 (1974); *see also* Pate v. Robinson, 383 U.S. 375, 385 (1966) (finding that it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently "waive" his right to have the court determine his capacity to stand trial). Next, although the Respondent argues that the waiver rule results in a

procedural default of Nara's claim, it cites no Pennsylvania cases to support its argument which shows that the Pennsylvania courts consistently and regularly applied the waiver rule with respect to mental incompetency claims; in fact, the law sways in the other direction. That said, the ultimate burden rests with a respondent to prove procedural default by showing the adequacy and independence of the state procedural rule. *See* Hooks v. Ward, 184 F.3d 1206, 1216-17 (10th Cir. 1999). This burden, however, is not shouldered by a respondent until the petitioner establishes that the state procedural rule is either not adequate or not independent. *See id.* In other words, although the respondent bears the ultimate burden of proof or persuasion, the petitioner bears the initial burden of production; *i.e.*, producing evidence of the state procedural rule's inadequacy or lack of independence. To satisfy this burden, a petitioner is

required to set out specific factual allegations that establishes the inadequacy of the state procedure. *See* Smallwood v. Gibson, 191 F.3d 1257, 1268 (10th Cir. 1999).

Here, Nara has met his burden of proof of showing that the Pennsylvania courts did not consistently and regularly apply the waiver rule in Pennsylvania Rule of Criminal Procedure 321 with respect to claims of mental incompetency. Consequently, the burden shifted back to the Commonwealth to prove that the waiver rule was adequate. The Respondent, however, has failed to satisfy its burden because it has not shown that the waiver rule related to Pennsylvania Rule of Criminal Procedure 321 was regularly and consistently applied to claims that are connected to a defendant's competency to plead guilty. The Respondent, therefore, has failed to satisfy its burden with respect

to the procedural default issue and Nara's failure to comply with Pennsylvania Rule of Criminal Procedure 321 does not preclude the court from reviewing his competency claim.

b. 42 Pa. Cons. Stat. § 9544(b)

The Respondent further claims that the waiver rule set out in section 9544(b) of the PCRA is an adequate and independent state law rule which precludes federal habeas corpus review of Nara's competency claim.

In 1966, the Pennsylvania legislature enacted the Post Conviction Hearing Act ("PCHA"). *See* 42 Pa. Cons. Stat. § 9542 (repealed). On April 13, 1988, the Pennsylvania legislature repealed the PCHA and enacted the Post Conviction Relief Act ("PCRA). *See* 42 Pa. Cons. Stat. §§ 9541-46. The PCRA was substantially amended in 1995 and again in 1997. Nara filed his second post-conviction petition on April

21, 1988, eight days after the PCRA was enacted. At that time, the PCRA provided that "an issue is waived if the petitioner failed to raise it and if it could have been raised before the trial, at the trial, on appeal, in a habeas corpus proceeding or other proceeding actually conducted or in a prior proceeding actually conducted under this subchapter." *See* 42 Pa. Cons. Stat. § 9544(b). Applying this rule to Nara's second PCRA proceeding, the Pennsylvania Superior Court held that he had waived his incompetency claim because he failed to raise it in his first post conviction proceeding.

As an initial matter, this court recognizes that the Pennsylvania Supreme Court repeatedly has held that the waiver rules set out in the Pennsylvania Post Conviction Hearing Act and the Pennsylvania Post Conviction Relief act are inapplicable to competency claims. *See* Commonwealth v. Giknis, 491 Pa. 215,

420 A.2d 419 (1980) (holding that "when the issue presented is whether a person was competent to stand trial, the waiver rule is not applicable.") (internal quotations and citations omitted); Commonwealth v. Fernandez, 487 Pa. 493, 497, 410 A.2d 296, 298 n. 8 (1980) (same); Commonwealth v. Nelson, 489 Pa. 491, 497, 414 A.2d 998, 1001 (1980) (same); *see also* Commonwealth v. Brown, 872 A2d. 1139 (Pa. 2005) (holding that defendant's failure to previously raise a claim that he was incompetent to stand trial did not constitute a waiver of that claim for purposes of the PCRA); Commonwealth v. Santiago, 579 Pa. 46, 855 A.2d 682, 692 n.9 (2004) (plurality opinion) ("the issue of whether a defendant was competent to stand trial is an exception to [the waiver] rule).

Next, the Respondent claims that Nara's incompetency cannot affect his waiver under the

PCRA waiver rule because he did not establish that he was incompetent during his first PCRA proceeding. Even assuming, however, that Nara was competent during his first PCRA proceeding, the Respondent has not demonstrated that the PCRA waiver provision resulted in a procedural default of his competency claim. In order for Nara's competency claim to be procedurally defaulted, the Pennsylvania courts -in April of 1998- must have consistently and regularly applied the waiver rule to clams of mental incompetency that are related to either guilty pleas or a petitioner's ability to proceed to trial. Again, the Respondent has failed to demonstrate that the PCRA waiver rule was regularly and consistently applied to claims of incompetency.

Nara filed his first PCRA Petition on April 21, 1988. The waiver provision in section 9544(b) of the PCRA was enacted eight days earlier -on April 13,

1988- when the Pennsylvania Post Conviction Hearing Act (PCHA) was rewritten and re-enacted as the Pennsylvania Post Conviction Relief Act. The prior waiver provision in the repealed PCHA provided as follows:

> (b) Issues waived.--For the purposes of this subchapter, an issue is waived if:
>
> > (1) The petitioner knowingly and understandingly failed to raise it and it could have been raised before the trial, at the trial, on appeal, in a habeas corpus proceeding or any other proceeding actually conducted or in a prior proceeding actually initiated under this subchapter.
> >
> > (2) The petitioner is unable to prove the existence of extraordinary circumstances to justify his failure to raise the issue.

See 42 Pa. Cons. Stat. § 9544(b) (repealed). As set out *supra*, the waiver provision in section 9544(b) of the PCRA was the same as the waiver provision in section 9544(b)(1) of the PCHA. During this sequence of time, however, it was the rule, not the exception,

for the Pennsylvania courts to review successive post conviction petitions. *See* Commonwealth v. Lawson, 519 Pa. 504 (1988). This was particularly true, as the Lawson court recognized, where the petitioner asserted an ineffective assistance of prior counsel claim, including PCRA counsel, to overcome the waiver. As Nara points out here, during the hearings conducted in his second PCRA proceeding, his counsel argued that his prior PCRA counsel provided ineffective assistance. *See* Doc. 86, Ex. AAA. Moreover, the language of the waiver provisions in the 1988 PCRA and the former PCHA is the same - the notable difference being the deletion of the "extraordinary circumstances" provision.

A state procedural rule will not bar federal review of a habeas claim unless that rule was firmly established and regularly followed at the time the default occurred. *See* Ford v. Georgia, 498 U.S. 411,

424 (1991) (*holding that "an adequate and independent state procedural bar to the entertainment of constitutional claims must have been firmly established and regularly followed . . . "*). As such, in determining whether a particular state rule is independent and adequate, this Court must identify the state procedural rule, determine the time at which the alleged default occurred and then decide whether the rule was firmly established and regularly and consistently applied. *See* Bronshtein v. Horn, 404 F.3d 700, 708 (3d Cir. 2005).

Here, the procedural rule relied upon was the waiver provision set out in section 9544(b) of the PCRA. Next, the alleged waiver occurred on April 21, 1988, when Nara filed his first PCRA petition. Finally, according to the Supreme Court of Pennsylvania in Lawson, prior to its decision on October 17, 1988, the waiver rule in the former

PCHA, which included the same language as the 1988 PCRA, was not consistently followed. *See* Laird v. Horn, 159 F. Supp.2d 58, 75 (E.D. Pa. 2001) ("Since petitioner had no way of knowing throughout the pendency of his Pennsylvania Post Conviction Relief Act . . . proceedings that the Pennsylvania Supreme Court was going to change course and decline to apply the relaxed waiver rule in his case, the [shift in the law] was inadequate to preclude habeas review . . ."). The same analysis applies to Nara. Because the Lawson "miscarriage of justice" rule was not firmly established and regularly applied on the date when Nara filed his first PCRA petition, the doctrine of procedural default is inapplicable in this case.[16]

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[16]In Lawson the Pennsylvania Supreme Court held that "[A] second or any subject post-conviction request for relief will not be entertained unless a strong *prima facie* showing is offered to demonstrate that a miscarriage of justice may have occurred." *See* Lawson, 519 Pa. at 513.

Accord Bronshtein v. Horn, 404 F.3d 700, 708 (3d Cir. 2005) (holding that the PCRA one-year limitations rule applied by the Pennsylvania Supreme Court was not firmly established); Jermyn v. Horn, 266 F.3d 257, 279 (3d Cir. 2001) (the state procedural rule was not "adequate" because as of the date of the procedural default, the Pennsylvania courts routinely reviewed the merits of second or successive PCRA petitions in capital cases).

Here, Nara has met his burden of proof by showing that in April of 1988, the Pennsylvania courts applied the waiver rules in the PCHA and the PCRA in an inconsistent manner and allowed the filing of second or successive PCRA petitions as a matter of course -particularly where the claims in the second PCRA petition included allegations of ineffective assistance of first PCRA counsel. The

burden shifted back to the Commonwealth and the Respondent has not carried its burden of proof.

The record, parenthetically, shows otherwise. The PCRA court reviewed Nara's competency claim and granted him relief. Implicit in the court's holding is the determination that Nara's claim fits within the "miscarriage of justice" rule announced in Lawson. In granting Nara relief in his second PCRA petition, the Court specifically held that a "manifest injustice" would result if the Court denied the withdrawal of the guilty pleas in light of the evidence of Nara's incompetency. *See* Doc. 86, Ex. CCC, citing Commonwealth v. Campbell, 309 Pa. Super. 214, 219, 455 A.2d 126, 128 (1983) (holding that a defendant incurs manifest injustice when a defendant is denied leave to withdraw a plea that was entered involuntarily).

The Respondent argues that the newly-enacted PCRA eliminated the "extraordinary circumstances" exception to the waiver rule, which, according to the Lawson court, was the basis for the Pennsylvania courts' "overly generous" attitude in allowing the filing of successive post conviction petitions. As an initial matter it appears that, notwithstanding the repeal of this language, the court used the same language in its Memorandum: "Therefore, absent any *extraordinary circumstances*, we deem this matter waived in the first instance since '[appellee] failed to raise [the issue] and . . . it could have been raised . . . in a prior proceeding actually conducted under this subchapter.' 42 Pa.C.S.A. § 9544(b)." (emphasis added). *See* Doc. 66, Ex. EEE at 3. Consequently, while the PCRA eliminated the "extraordinary circumstances" language, the court relied on that precise language in its opinion. Thus, the

pronouncement in Lawson does appear to be applicable to Nara's case because the court utilized the repealed language of the PCHA in deciding his case. As recognized in Lawson, the Pennsylvania courts routinely applied the extraordinary circumstances exception to allow the review of waived claims based on ineffective assistance of prior PCRA counsel. Thus, when Nara filed his PCRA petition, it was the rule, not the exception, that the Pennsylvania courts reviewed the merits of second or successive PCRA petitions. The Pennsylvania Superior Court has addressed the issue in a similar manner:

> . . . We interpret the removal of the extraordinary circumstances language not so much as the closing of a "loophole," but rather as the extraction of excess language. Although the 1988 amendments retained ineffectiveness of counsel as a separate basis for relief under the PCRA, the amendments added the limitation that the ineffectiveness must have undermined the truth-determining process.

See Commonwealth v. Carbone, 707 A.2d 1145, 1150 (Pa. Super. 1998).

Also, as recognized by several scholars -from 1988 until 1995- when the PCRA was amended, the Pennsylvania's courts developed a large body of case law establishing exceptions which by-pass the PCRA's statutory bar rules. Specifically, the Pennsylvania courts have allowed a review of claims that were barred by the PCRA's statutory waiver rules when: 1) the failure to raise the claim earlier was caused by ineffective assistance of prior counsel (including prior post-conviction counsel);[17] 2) the failure to address the

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[17] *See, e.g.*, Commonwealth v. Allen, 557 Pa. 135, 144, 732 A.2d 582, 587 (1999) (holding that a claim of ineffectiveness will not be deemed waived under the PCRA where the petitioner has layered the claim by alleging the ineffectiveness of all prior counsel for failing to pursue the claim); Commonwealth v. Morales, 549 Pa. 400, 409, 701 A.2d 516, 520 (1997) ("Here, appellant could have raised all of his non-previously litigated claims on either direct appeal or in his first PCHA petition. Appellant, however, avoided waiving these claims in this PCRA petition

the merits of the claim could result in a "miscarriage of justice", *i.e.*, the Lawson standard; or 3) the claim challenged the legality of the sentence. *See* Louis Natali, Jr., New Bars in Pennsylvania Capital Post-Conviction Law and Their Implications for Federal Habeas Corpus Review, 73 Temple L. Rev. 69, 87

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by asserting that all of his prior counsel were ineffective for failing to previously raise them."); Commonwealth v. Cummings, 422 Pa. Super. 202, 619 A.2d 316 (1993) (claim that trial counsel was ineffective for failing to raise defense that petitioner was insane at time of shooting was not waived by failure to raise it at previous post conviction proceeding); Commonwealth v. Dukeman, 413 Pa. Super. 397, 605 A.2d 418 (1992) (holding that claims in second post-conviction petition that prior counsel were ineffective for failing to raise issues overcame bar of waiver caused by his failure to raise issues in prior postconviction proceeding); Commonwealth v. Albert, 522 Pa. 331, 561 A.2d 736 (1989) (holding that ineffective assistance of post conviction counsel claims are cognizable in state court). *See also* Lambert v. Blackwell, 134 F.3d 506, 522 n. 27 (3d Cir. 1998) ("[T]he Commonwealth acknowledged in its letter brief ... Pennsylvania decisional law holding that 'PCRA courts will consider claims which otherwise would be deemed waived when raised under the rubric of ineffective assistance of counsel . . . .") (citations omitted).

(2000) (discussing the exceptions to the statutory waiver provisions in both capital and non-capital cases).

> [T]here is no statutory basis for any of the other above-described waiver-overcoming mechanisms of ineffective assistance of counsel, miscarriage of justice, and illegality of sentence, and the Pennsylvania Supreme Court has never identified any statutory basis for them. They are entirely court-made, and they were consistently used to afford merits review to claims for which such review was foreclosed by the PCRA's statutory language.

Id. at 99. The discussion *supra* demonstrates that the Respondent has not carried its burden of demonstrating that the Pennsylvania courts consistently and regularly applied the statutory waiver rule to preclude claims of incompetency as raised by Nara in his 1988 PCRA petition. *See* 42 Pa. Cons. Stat. § 9544(b). Thus, this Court is not precluded from reviewing Nara's competency claim on

this basis. *See cf.* Doctor v. Walters, 96 F.3d 657, 686 (3d Cir. 1996) (concluding that the Pennsylvania state courts did not rely on an "adequate" procedural rule to deny petitioner a review of his appeal on the merits).

c. 42 Pa. Cons. Stat. § 9543(a) (3).

There is one last procedural hurdle applicable to Nara's competency claim. *See* 42 Pa. Cons. Stat. § 9543(a). The relevant portion of the PCRA provides as follows.

> (a) . . . .
>
> (3) [To be eligible for relief, a petitioner must show] [t]hat the allegation of error has not been previously litigated and one of the following applies:
>
> > (I) The allegation of error has not been waived.
> > (ii) If the allegation of error has been waived, the alleged error has resulted in the conviction or affirmance of sentence of an innocent individual.

> (iii) If the allegation of error has been waived, the waiver of the allegation of error during pretrial, trial, post-trial or direct appeal proceedings does not constitute a State procedural default barring Federal habeas corpus relief.
>
> (4) That the failure to litigate the issue prior to or during trial or on direct appeal could not have been the result of any rational strategic or tactical decision by counsel.

See 42 Pa. Cons. Stat. § 9543(a) (1988). On review of Nara's second PCRA petition, the Pennsylvania Superior Court held that Nara could not establish eligibility for relief under subsection (a)(3)(i) of the PCRA rule cited immediately *supra*. The court found that the first subpart of the rule was inapplicable because Nara had waived his claim by failing to assert it in his previous PCHA petition. The Superior Court further held that subpart (a)(3)(ii) was irrelevant to Nara's claim because he had pleaded guilty and, therefore, he could not show that the

alleged error resulted in either the conviction or the affirmance of the sentence of an innocent individual. Finally, the Superior Court ruled that subpart (a)(3)(iii) was inapplicable because the waiver occurred during Nara's PCRA petition and not during pretrial, trial, post-trial or direct appeal proceedings.

The Superior Court's ruling in Nara's case is inadequate to support a procedural default of his claims because the Pennsylvania courts did not routinely apply the requirements in 42 Pa. Cons. Stat. § 9543(a)(3) to claims asserted under the court-based waiver exceptions. *See, e.g.*, Commonwealth v. Jermyn, 551 Pa. 96, 709 A.2d 849 (1998) (reviewing claims in second PCRA petition alleging ineffective assistance of PCRA counsel without applying innocence prong in section 9543(a)(3)(ii)); Commonwealth v. Morales, 549 Pa. 400, 701 A.2d 516 (1997) (holding that waiver will be excused under the

PCRA if appellant can meet the conditions of 42 Pa. Cons. Stat. § 9543(a)(3)(ii) or (iii) *or if the appellant makes a showing of ineffective assistance of counsel*) (emphasis added); Commonwealth v. Romansky, 702 A.2d 1064, 1065 (Pa. Super. 1997) (showing of miscarriage of justice entitled defendant to relief on his second PCRA petition even though he "does not posit that he is innocent."), *appeal denied*, 555 Pa. 699, 723 A.2d 670 (1998); Commonwealth v. Williams, 442 Pa. Super. 590, 660 A.2d 614 (1995) (claim that defendant did not receive the sentence he was promised raised the possibility of a miscarriage of justice), *appeal denied*, 544 Pa. 608, 674 A.2d 1071 (1996); 2 West's Pennsylvania Practice § 17.3, Eligibility for Relief: Second and Successive Petitions (2004) ("The Lawson test is in the alternative; therefore, a defendant need not make a showing that his claims relate to innocence in order to be entitled

to relief."). *See cf.* Commonwealth v. McFadden, 402 Pa. Super. 517, 521-522, 587 A.2d 740, 742 (1991) (holding that the claims presented in the instant petition were cognizable under the PCRA because the failure to request an appropriate jury instruction on accident or self-defense raised a question of whether an 'innocent individual' has been convicted).

The federal courts, interpreting the waiver and eligibility provisions of the PCRA, similarly have not interpreted the requirements in 42 Pa. Cons. Stat. 9543(a)(3) as applying to the judge-made waiver exceptions -such as the miscarriage of justice claim. Also, the Court of Appeals for the Third Circuit has indicated that the claim asserted by Nara would be cognizable in a second PCRA petition. *See* Hull v. Kyler, 190 F.3d 88 (3d Cir. 1999):

> Pennsylvania courts will entertain a post-conviction claim that has been waived or that is contained in a second . . . post-conviction petition if the petitioner

> makes a strong prima facie showing ... that a miscarriage of justice may have occurred.

See id. at 101 n.4. In Hull the court also stated in *dicta* that a due process claim couched as an incompetency issue "is potentially one in which a 'miscarriage of justice' occurred which no civilized society can tolerate." *See also* Crawley v. Horn, 7 F. Supp. 2d 587 (E.D. Pa. 1998) (a prosecution that withholds exculpatory evidence could "satisfy the miscarriage of justice exception"); Hammock v. Vaughn, 1998 WL 163194 (E.D. Pa. Apr. 7, 1998) (concluding that constitutional claims such as double jeopardy, Brady, and ineffective assistance of counsel might be addressed under the "miscarriage of justice" exception to the 9544(b) waiver rule); Belle v. Stepanik, 1996 WL 663872, at *3 (E.D. Pa. Nov. 14, 1996) ("Although the PCRA statute deems waived claims that could have been raised on direct appeal or

in an earlier PCRA petition, Pennsylvania courts have consistently read into the statute an exception for miscarriages of justice."); Cummings v. Love, 1994 WL 164122 (E.D. Pa. May 3, 1994) (noting Pennsylvania state court holding that "miscarriage of justice" is established if counsel is ineffective for failing to procure mental health expert and concluding that petitioner's claim that state violated due process and equal protection by failing to provide expert also might come within Pennsylvania's miscarriage of justice standard); Sutton v. Vaughn, 741 F. Supp. 564, 566 (E.D. Pa. 1990) (pointing out that Pennsylvania courts address merits of ineffective assistance of PCRA counsel claims, even when they are technically waived, under "miscarriage of justice" exception to waiver).[18]

---

[18] In addition, the Superior Court's basis for holding 42 Pa. Cons. Stat. § 9543(a)(ii) inapplicable rested upon a faulty premise. In this regard, the Superior

D. The State Court's Adjudication of Nara's Competency Claim

The discussion *supra* reveals that the procedural rules relied upon by the Pennsylvania Superior Court in refusing to review Nara's competency claim in his second and third PCRA proceedings are not adequate to support a procedural default of this claim in federal court. Thus, this Court can proceed to review the decision of the PCRA Court granting Nara relief on the basis of an incompetency claim.[19]

Court held that section 9543(a)(ii) was irrelevant to Nara because he pleaded guilty and the record was replete with his affirmations of his guilt. This finding assumes Nara's plea was voluntary and intelligent, which is a finding that involves a federal question. Thus, that holding is not sufficiently independent to support a procedural default. Moreover, such a presumption is directly contrary to the holding of the PCRA Court, which found Nara incompetent to plead guilty. Consequently, the adequacy of his affirmations of guilt during his plea colloquy are suspect at best.

[19] Although Nara sought review of the Superior Court rulings, in each instance the Supreme Court of

The PCRA Court described the state of Nara's mental health at the time he entered his guilty plea in the text which follows:

> Defendant was mentally incompetent to knowingly and intelligently plead guilty on June 20, 1984 to two (2) counts of first degree murder. We base this finding on the testimony elicited from a hearing held on November 19, 1990. At that hearing, Dr. Jopindar Harika testified for the defense.
>
> Dr. Harika is a forensic psychiatrist whose field of expertise relates to the criminal aspects of psychiatry and the law. He has worked in this area

---

Pennsylvania denied his petition for allowance of appeal without any explanation. An unexplained order of a state court upholding a prior judgment of a lower court is presumed to be based upon the same ground as that relied upon by the lower court. *See* Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991). Thus, if the lower court rejected a claim on the merits, a silent denial of an appeal is presumed to be on the merits; if the lower court relied on a procedural default, an unexplained order affirming that judgment is presumed to similarly rely on procedural default. *Id.* Because the Supreme Court denied Nara's petitions for review without explanation, this Court must presume that the judgment relied upon the same procedural grounds relied upon by the Superior Court. As already stated, none of those procedural grounds are sufficient to support a procedural default of Nara's claim in this Court.

since 1982 and has been a consultant with the Fayette County Prison since 1989. Although he met with defendant only once, he did review defendant's records from his various periods of hospitalization for mental illness and his prison medical records. Based on this, Dr. Harika expressed the opinion that at the time of the pleas, defendant was not mentally capable of knowingly and intelligently entering into guilty pleas.

Dr. Harika further testified that defendant was depressed and psychotic. The psychosis exhibited itself in defendant's losing touch with reality. The doctor testified that although defendant may have appeared to be normal throughout the plea colloquy, this appearance of normality could be deceiving. Defendant, in fact, could have been suffering from a mental illness. Even though defendant may have understood the proceedings, he may not have been able to know the meaning of his answers.

Part of the depression and psychosis was defendant's feelings of worthlessness, wanting to die, and his desire to be punished. It was Dr. Harika's opinion that this was a contributing factor to defendant's willingness to plead guilty to two (2) counts of first degree murder.

The Court found Dr. Harika to be a competent and experienced forensic psychiatrist, whose testimony was quite convincing. The Commonwealth, however, presented no evidence to rebut or to contradict Dr. Harika's opinions and conclusions regarding defendant's mental competency at the time of the pleas. The Commonwealth had ample time to request a competency evaluation of defendant.

However, it chose not to, and instead, relied solely upon the cross-examination of Dr. Harika and the number of times throughout the plea colloquy that defendant said he understood what was transpiring. As we stated, even though defendant may have said he understood, it was Dr. Harika's uncontradicted testimony that defendant did not know the meaning of many of his answers.

Hence, based on the totality of the circumstances, and particularly on the unrebutted testimony of Dr. Harika, we conclude that defendant's mental state at the time of the pleas rendered his pleas involuntary. As such, they rise to the level of manifest injustice.

See Doc. 88, Ex. CCC, PCRA Ct. Op. at 3-4. The determination of whether a defendant is competent or not is a question of fact subject to deference and to the presumption of correctness. *See* 28 U.S.C. § 2254(e)(1). *See* also Maggio v. Fulford, 462 U.S. 111, 117 (1983) (*per curiam*); Demosthenes v. Baal, 495 U.S. 731, 735 (1990) (*per curiam*) ("We have held that a state court's conclusion regarding a defendant's competency is entitled to such a presumption."); Thompson v. Keohane, 516 U.S. 99, 111 (1995) ("In

several cases, the Court has classified as 'factual issues' within § 2254(d) [a defendant's] competency to stand trial [and] [w]hile these issues encompass more Than 'basic, primary, or historical facts,' their resolution depends heavily on the trial court's appraisal of witness credibility and demeanor. . . .") (internal quotations and citations omitted). "[I]t is well established that the Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial." *See* Medina v. California, 505 U.S. 437, 439 (1992). It necessarily follows that a criminal defendant may not be tried unless he is competent and he may not waive his right to counsel or plead guilty unless he acts competently and intelligently. *See* Godinez v. Moran, 509 U.S. at 396 (internal citations omitted).

Here, the Pennsylvania PCRA Court found that Nara's guilty pleas were not knowingly made because he was incompetent at the time of the plea colloquy. Comity requires this federal court to respect the factual finding of incompetency made by the Pennsylvania state court. Under these circumstances, Nara has demonstrated that he is entitled to federal habeas corpus relief.

III. CONCLUSION

It is respectfully recommended that the Petition for writ of Habeas Corpus filed by Joseph George Nara be granted to the extent that his guilty pleas be withdrawn and the Respondent be directed to release him unless the Commonwealth commences trial within one-hundred and twenty days of the Memorandum Order.

In accordance with the Magistrate's Act, 28 U.S.C. § 636 (b)(1)(B) and (C), and Rule 72.1.4 (B) of the Local Rules for Magistrates, objections to this Report and Recommendation are due by September 19, 2005. Responses to objections are due by September 29, 2005. Failure to file timely objections may constitute a waiver of any appellate rights.

September 1, 2005

/s/Francis X. Caiazza
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IN THE

Supreme Court of the United States

RAY LAWLER,

Petitioner,

v.

JOSEPH NARA.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether, when the state and federal constitutional standards are identical, it was plain error for the district court to conclude that a claim of mental incompetency to enter a guilty plea fairly presented a federal constitutional question.

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STATEMENT

1. In December 1983, Joseph Nara's wife left him after she allegedly had become involved in multiple extramarital affairs. Pet. App. 3f. The estrangement caused Nara to become despondent and suicidal. *Id.* at 2d-3d. He sought help from a local mental health center on a "crisis" basis, and shortly thereafter attempted suicide. Following the suicide attempt, he was involuntarily committed to a state psychiatric hospital, where he was treated with antipsychotic and antidepressant drugs. *Id.* at 3d.

After his release from the psychiatric hospital, Nara discovered love letters between his wife and a Pennsylvania State Trooper. After his wife taunted him during a telephone call, Nara drove to his mother-in-law's home to confront his wife. When Nara arrived at the door, his mother-in-law aimed a shotgun in his face and ordered him to leave. An infuriated Nara retrieved a pistol from his car and burst into the house. His mother-in-law again aimed the shotgun at him, while his wife repeatedly struck him with the telephone. In the ensuing struggle, Nara shot and killed both women. Pet. App. 3d.

Nara fled the state, but the next day he telephoned the Pennsylvania State Police and admitted to the killings. He turned himself in and was then charged with two counts of first-degree murder. Pet. App. 3d.

Nara's family grew fearful that he would harm himself in prison, and an employee of the local

mental health center where Nara had previously been treated warned Nara's attorney that he was in need of an immediate mental health evaluation and treatment. Pet. App. 3d-4d. Nara's attorney filed a petition under the Pennsylvania Mental Health Act seeking to have Nara transferred to a state psychiatric hospital for evaluation and commitment, explaining that Nara could harm himself or others. The petition was granted, and Nara was transferred to Mayview State Hospital, where he was treated for depression and suicidal ideations. Nara's attorney, however, did not investigate either Nara's competence to stand trial or his mental state at the time of the killings. *Ibid.* Four days later, Nara was returned to the county prison, where he remained for four months without treatment. *Ibid.*

On June 20, 1984, Nara pled guilty to two counts of first-degree murder before Judge William Franks of the Fayette County Court of Common Pleas. During the plea colloquy, Nara denied having been treated for any mental or emotional illnesses. Pet. App. 4d-5d. Judge Franks then sentenced Nara to two concurrent life sentences. *Id.* at 5d.

After sentencing, prison officials immediately placed Nara in the prison's medical unit "for psychiatric reasons," where he was again treated with antipsychotic and antidepressant drugs, and put in a leg restraint to prevent suicide attempts. Pet. App. 5d. After Nara was diagnosed with "intense suicidal ideation of severe proportions," prison officials had him involuntarily committed to a state psychiatric hospital for 90 days. *Ibid.*

During that time, Nara did not appeal his plea or sentence. In February 1985, Nara once again attempted suicide, and prison officials petitioned to have him involuntarily committed. The judge ordered Nara to be committed in March 1985, and Nara was not released from that commitment until July 1986. Pet. App. 7f-9f.

2. In April 1988, Nara filed a pro se petition for post-conviction relief under the Pennsylvania Post Conviction Hearing Act (PCHA). That petition argued that his "constitutional rights" were violated because the court "accept[ed] his pleas while he was mentally incompetent." Pet. App. 6d. More specifically, the petition alleged that his "Guilty Plea[] is unconstitutional due to being taken in violation of both State and Federal Constitutions," DCT App. 198, because Nara "was incompetent, during the Guilty Plea, * * * in violation of the Constitution(s) both State and Federal," *id.* at 200. Nara's pro se brief in support of his petition similarly asserted that his mental incompetency at the time of the plea violated both the state and federal Constitutions. *Id.* at 207-210; see *id.* at 213 (citing "U.S.C.A. Const Amends 5, 14" and a number of federal cases). The petition also alleged ineffective assistance of counsel based on counsel's failure to have Nara's competency evaluated. Pet. App. 6d.

The trial court denied the petition, addressing only Nara's ineffective assistance of counsel claim. The court mistakenly failed to address the independent mental competency claim. Pet. App. 6d. Nara's counsel appealed, challenging only the

trial court's ineffective assistance of counsel ruling. The Pennsylvania Superior Court denied the appeal on technical grounds, because counsel had failed to conform the petition to the Post-Conviction Relief Act, which had been enacted 12 days before Nara filed his pro se petition. *Id.* at 6d & n.1; see DCT App. 431-433.

Nara then filed a pro se petition for allowance of appeal with the Pennsylvania Supreme Court, which raised both the incompetency claims and ineffective assistance of counsel claims. Pet. App. 6d-7d. That petition specifically invoked the federal Constitution. DCT App. 813-814. The Pennsylvania Supreme Court denied review. Pet. App. 7d; DCT App. 434.

3. In May 1990, Nara filed a second, pro se petition for post-conviction relief. In that petition, he alleged that his plea was "unlawfully induced," Pet. App. 7d, and that his first post-conviction counsel was incompetent for failing to conform the petition to the new Pennsylvania post-conviction law, to present claims for relief "under the applicable state and federal constitutional standards," and "to raise state and federal constitutional arguments," DCT App. 437. The petition also specifically indicated that Nara sought relief for "[a] violation of the provisions of the constitution, law or treaties of the United States which would require the granting of federal habeas corpus relief to a state prisoner." *Id.* at 436. The court subsequently permitted Nara to amend his petition to claim specifically that he had been

mentally incompetent when he pleaded guilty. Pet. App. 7d.

After appointing counsel, the trial court held evidentiary hearings, at which a forensic psychiatrist testified that, based on his study, Nara "was probably 'psychotic' and incapable of entering a plea" at the time of his guilty plea. Pet. App. 7d-8d. The government did not present any rebuttal testimony. *Ibid.* Following the hearing, the trial judge – Judge Franks, the same judge who had taken and witnessed Nara's guilty pleas six years earlier – found the evidence to be "quite convincing" that Nara "was mentally incompetent to knowingly and intelligently plead guilty." DCT App. 573-574; see *id.* at 575 ("[B]ased on the totality of the circumstances, * * * we conclude that defendant's mental state at the time of the pleas rendered his pleas involuntary."); Pet. App. 8d; see generally DCT App. 571-575.

The Commonwealth appealed, and the Pennsylvania Superior Court reversed. The court first explained that the issue on which Judge Franks granted relief – "the invalidity of the 1984 pleas because of [Nara]'s alleged incompetence" – "is the same [issue] as that which was raised in [Nara]'s initial post-conviction petition in 1988 and on appeal therefrom." DCT App. 580. In response to Nara's argument that the prior ruling turned on procedural grounds and thus did not address whether the plea "undermine[d] the truth-determining process," the Superior Court found that contention to have been waived because it was not raised in the first petition. *Ibid.* The court further

ruled that the claim was waived because Nara had not challenged the validity of the pleas within ten days of their entry as required by the Pennsylvania Rules of Criminal Procedure. Pet. App. 8d.

Nara petitioned the Pennsylvania Supreme Court for an allowance of appeal, specifically contending, *inter alia*, that reinstatement of his pleas violated "his due process rights under the Pennsylvania and United States Constitutions," DCT App. 826, because "he was mentally ill and incompetent," *id.* at 825. The Pennsylvania Supreme Court denied relief. *Id.* at 584. Nara filed a petition for a writ of certiorari with this Court that again specifically argued that the entry of his plea violated the federal Constitution because of his incompetency, *id.* at 586, 595; 92-7460 Pet. 1, 10, but this Court denied certiorari, *Nara v. Pennsylvania*, 507 U.S. 995 (1993) (No. 92-7460).

4. In December 1995, Nara filed a third state post-conviction petition in which he again alleged that he had been incompetent at the time he pleaded guilty. Pet. App. 9d. He expressly included as part of his petition a "summary of argument" from a 1990 letter, in which he explained that his incompetency claim arose "under state and federal constitutional standards." See 3d PCRA Pet. 3A & Exh. B; see also 3d PCRA Pet. 3 & Exh. A (explaining that the incompetency claims reflected "violations of both the state and federal constitutions"); *id.* Exh. A ("Generally, a guilty plea which has not been voluntarily and intelligently entered is constitutionally infirm under both the state and federal constitutions.").

Judge Franks permitted Nara, through appointed counsel, to withdraw his petition and file a motion to withdraw his guilty pleas *nunc pro tunc*. Pet. App. 9d. The court then held that, while Nara "has been consistent in his allegations in seeking to withdraw the pleas," DCT App. 657, Nara had waived his incompetency claim because he had not challenged his pleas within ten days of their entry. Nara appealed, noting that Judge Franks had previously held that he was, in fact, incompetent, but the judgment was affirmed. Pet. App. 9d. Nara repeated his argument to the Pennsylvania Supreme Court, which denied review in December 1997. *Id*. at 9d & n.9.

5. a. In December 1998, Nara filed a pro se habeas petition in the United States District Court for the Western District of Pennsylvania, seeking relief on the ground, *inter alia*, that the entry of his pleas at a time when he was mentally incompetent violated the federal Constitution's guarantee of due process, U.S. Const. amend. XIV. The district court initially dismissed the petition as untimely, but the court of appeals reversed and remanded for a hearing on whether the statute of limitations should be equitably tolled based on Nara's "ongoing periods of mental incompetence and allegations that [his lawyer] abandoned him following his appeal to the Pennsylvania Supreme Court." Pet. App. 10d (quotation omitted).

On remand, the magistrate judge found that Nara's lawyer had misled him and thereby prevented him from complying with the statute of limitations, which resulted in equitable tolling of

the limitations period. The Commonwealth did not object, and the district court then adopted the Report and Recommendation. Pet. App. 10d.

The magistrate judge subsequently issued a lengthy Report and Recommendation, see Pet. App. 1f-64f, in which he concluded, as relevant here, that Nara had "fairly presented" his incompetency claim to each level of the Pennsylvania judiciary, *id.* at 29f, and that Nara's federal due process rights were violated because he was mentally incompetent when he pleaded guilty, *id.* at 63f.

With respect to presentation of the incompetency claim to the state courts, the magistrate judge first analyzed the state and federal constitutional standards, and determined that they were "virtually indistinguishable" and analytically "indistinct." Pet. App. 29f-30f (quoting *Bisaccia v. Attorney General of New Jersey*, 623 F.2d 307, 312 (3d Cir.), cert. denied, 449 U.S. 1042 (1980)); see also Pet. App. 23f-29f. Because of Nara's persistence in presenting his constitutional claim based on incompetency to the state courts and because "[t]he authority cited in Nara's brief clearly shows that he raised a constitutional claim with respect to his guilty pleas; *i.e.*, that he was incompetent at the time he entered his guilty pleas," the magistrate judge found "no basis for the [Commonwealth]'s assertion that Nara did not fairly present his incompetency argument as a federal claim." *Id.* at 29f. Indeed, the magistrate judge found the argument to be "patently without merit," because Nara "presented his claim in specific terms that directly pointed to a right protected by the

Constitution." *Ibid.* The magistrate judge further found, in the alternative, that procedural default would not apply because the ineffectiveness of Nara's counsel and his mental incompetence would have constituted "extraordinary circumstances" excusing any such default as a matter of state law. *Id.* at 46f-51f; see *id.* at 50f (the government "has not carried its burden of demonstrating that the Pennsylvania courts consistently and regularly applied the statutory waiver rule to preclude claims of incompetency"). Finally, deferring to the state court's factual finding that Nara was incompetent at the time of his pleas, *id.* at 61f-63f, the magistrate judge concluded that the pleas were entered in violation of the federal Constitution, *id.* at 63f.

b. Under the Federal Magistrate Judge's Act, 28 U.S.C. § 636, both parties had ten days to object to the Report and Recommendation, which specifically warned that "[f]ailure to file timely objections may constitute a waiver of any appellate rights." Pet. App. 11d. Neither petitioner nor Nara filed any objections. Twenty-six days after the magistrate judge issued the Report and Recommendation, the district court adopted the decision and granted Nara's petition for a writ of habeas corpus. *Id.* at 1e-4e.

Seventeen days later, petitioner filed a motion to vacate the district court's judgment pursuant to Federal Rule of Civil Procedure 60(b), claiming that it was unaware of the Report and Recommendation, notwithstanding the district court's standing order for attorneys to register with its Case Management/Electronic Case Files system.

Pet. App. 11d, 13d. Before the district court could rule on the motion, petitioner filed a notice of appeal. The district court subsequently dismissed the Rule 60(b) motion as moot. *Id.* at 11d-12d.

6. The court of appeals affirmed. The court first held that petitioner's appeal would be reviewed under a plain error standard of review, because petitioner had failed to pursue any argument or objection to the district court either based on the magistrate judge's Report and Recommendation or in its abandoned Rule 60(b) filing. Pet. App. 12d-20d. The court of appeals explained that petitioner's "overall negligence in handling the matter preclude[d] [it] from finding" that petitioner's failure to file timely objections was excusable. *Id.* at 13d. Beyond failing to object to the magistrate judge's report and recommendation, petitioner "ha[d] offered no excuse for" its failure to respond to the *district court's* order for an additional seventeen days, "[d]espite the urgency of the situation." *Id.* at 14d. Accordingly, the court of appeals held that petitioner's claims would be reviewed "for plain error." *Id.* at 14d, 18d. Under that standard, the district court's decision would be overturned only if petitioner demonstrated a "clear or obvious" error that "'seriously affected the fairness, integrity or public reputation of judicial proceedings.'" *Id.* at 20d (quoting *United States v. Olano*, 507 U.S. 725, 732 (1993)).

Applying that standard, the court of appeals held that the district court had not committed plain error in concluding that Nara had fairly presented his federal constitutional claim based on

incompetency to the state courts. Pet. App. 33d. Noting that the federal and state constitutional standards for reviewing claims of incompetency are identical, *id.* at 22d-23d, the court concluded that Nara had given the Commonwealth's courts "a full opportunity to address his federal incompetency claim by repeatedly stating his claim in terms so particular as to call to mind a specific right protected by the Constitution." *Id.* at 23d (quotation omitted). In particular, Nara's attorney had amended his second petition "to specifically include the argument that Nara was not competent to make a knowledgeable and willing plea at the time he entered it," and in his brief on appeal Nara had "articulated the test applied by both federal and state courts." *Ibid.* (quotation omitted). When he sought review by the Pennsylvania Supreme Court, "Nara specifically raised the invalidity of his plea, and * * * stated that he was mentally ill and incompetent to knowingly answer the plea court's questions." *Id.* at 24d (quotation omitted). Given the content of Nara's state court filings, the court of appeals concluded that it "[found] no plain error in the District Court's conclusion that Nara 'fairly presented' his incompetency claim to each level of the Pennsylvania judiciary." *Id.* at 33d.

The court of appeals further explained that its decision was consistent with *Baldwin v. Reese*, 541 U.S. 27 (2004), because the court required Nara's claims "to alert [the court] to the presence of a federal claim," Pet. App. 22d n.17, by stating it "in terms so particular as to call to mind a specific right protected by the Constitution," *id.* at 23d. The court concluded that the outline of that federal claim was

within Nara's pleadings themselves, and did not require courts "to search beyond the pleadings and briefs for a federal issue." *Id.* at 24d.

In addition, the court of appeals held that, even if it had found a plain and obvious error in the district court's decision, petitioner "ha[d] failed to show that any such error ha[d] seriously affected the fairness, integrity or public reputation of judicial proceedings." Pet. App. 33d n.20 (quotation omitted). In particular, the court of appeals ruled that, even if the incompetency claim had not been fairly presented, no procedural default would have resulted because "Pennsylvania courts * * * have consistently held rules of waiver inapplicable to incompetency claims." *Id.* at 25d. In addition, "Pennsylvania courts did not consistently bar successive post-conviction petitions – like Nara's – which allege prior counsel was ineffective." *Ibid.*

Finally, the court of appeals found no plain error in the conclusion that Nara's pleas had been obtained in violation of the Constitution due to his incompetency. Pet. App. 27d-33d. In particular, the court found no plain error in the district court's decision to accord a presumption of correctness to the state court's factual determination that Nara was incompetent at the time of the pleas, *id.* at 27d, because that factual determination "was left undisturbed by the Pennsylvania Superior Court," *id.* at 30d. The court of appeals further explained that "state trial judges deserve substantial deference" on such factual questions, and that "Judge Franks, a learned colleague of a coordinate court, was in a unique position from which he could

carefully assess witness credibility and demeanor in open court against his extensive experience with the case." *Id.* at 28d-29d. Because petitioner failed to come forward with any evidence to rebut the evidence of incompetency on which Judge Franks relied, the court of appeals concluded that there was "no plain error in the District Court's conclusion that Nara was incompetent when he pleaded guilty," and that, even if there had been error, it would not have "seriously affected the fairness, integrity or public reputation of judicial proceedings." *Id.* at 33d & n.20 (quotation omitted).

ARGUMENT

For all of petitioner's (misplaced) concern with Nara's alleged procedural default, petitioner is noticeably silent about its own. The petition nowhere mentions that the Commonwealth failed to object to the magistrate judge's Report and Recommendation, failed to file a timely motion to reconsider under Federal Rule of Civil Procedure 59, and abandoned its Rule 60(b) motion before the district court could rule. Petitioner also fails to mention that the court of appeals' decision was framed entirely in terms of plain error review. See Pet. 8-10. The consequence of that procedural history is that the question presented in the petition is not, in fact, a question presented by this case.

1. Petitioner seeks (Pet. 11-16) this Court's review of the court of appeals' purported holding that Nara had fairly presented his federal claim even though he (allegedly) "d[id] not label the claim as federal or cite to a federal source of law" (Pet. 11). The problem for petitioner is that the court of appeals

made no such holding. The court of appeals held only that it found "no *plain error* in the [d]istrict [c]ourt's conclusion that Nara 'fairly presented' his incompetency claim." Pet. App. 33d-34d (emphasis added).

That record-bound holding does not merit this Court's review. The court of appeals' ruling is not contrary to *Baldwin v. Reese*, 541 U.S. 27 (2004). That was not a plain error case. Moreover, the *Baldwin* decision did not address whether the presentation of a state constitutional claim that is *identical* to a federal constitutional claim – like the Pennsylvania and federal standards for incompetency claims, Pet. App. 22d-23d – amounts to fair presentation of a federal claim for exhaustion purposes. See *Baldwin*, 541 U.S. at 33-34; see also *Howell v. Mississippi*, 543 U.S. 440, 444 (2005) (per curiam) (addressing the fair presentation of non-identical state and federal claims). The district court's resolution of that unanswered question in a manner that, by petitioner's own admission (Pet. 13-14) is consistent with the decisions of at least three courts of appeals, is not plain error.

Nor does the petition contain any argument that the district court's decision to give effect to a state court factual finding of incompetency "seriously affected the fairness, integrity or public reputation of judicial proceedings." Pet. App. 20d (quoting *United States v. Olano*, 507 U.S. 725, 732 (1993)). That argument is therefore waived. See *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 151 n.3 (1976). As a result, petitioner could obtain no benefit from and could not prevail on this Court's review.

Furthermore, there is no conflict in the circuits on the question of whether it was plain error for the district court to conclude that Nara's repeated assertion of an incompetency claim was fairly presented, where the state and federal constitutional standards are identical. Nor does that unusual issue arise with any frequency.

2. a. Even putting aside the narrowness of the court of appeals' plain-error ruling, petitioner's arguments for this Court's review fail. Contrary to petitioner's contention (Pet. 12-14), there is no conflict in the circuits. All of the courts of appeals to consider the question have held that a state prisoner fairly presents his federal claim when he raises a state claim for which the federal standard is identical. See *Scarpa v. Dubois*, 38 F.3d 1, 7 (1st Cir. 1994) ("[A] state-law claim that is functionally identical to a federal-law claim suffices to effectuate fair presentment of the latter claim."), cert. denied, 513 U.S. 1129 (1995); *Jackson v. Edwards*, 404 F.3d 612, 618 (2d Cir. 2005) (claim fairly presented where the state law claim "was not merely 'somewhat similar,'" to the federal claim, but was "virtually identical") (quoting *Duncan v. Henry*, 513 U.S. 365, 366 (1995)); *Bisaccia v. Attorney General of New Jersey*, 623 F.2d 307, 312 (3d Cir.) (where the state-law claim is "virtually indistinguishable from the [federal] due process allegation[,] * * * exhaustion of state remedies has been met"), cert. denied, 449 U.S. 1042 (1980); see also *Verdin v. O'Leary*, 972 F.2d 1467, 1476 (7th Cir. 1992) (suggesting that petitioner properly exhausts his federal claims when the "facts *and* legal theory are the same" and he demonstrates a "clonal relationship" between the two).

Petitioner's argument (Pet. 13) that the Eighth Circuit has held otherwise is wrong. Petitioner relies on *Carney v. Fabian*, 487 F.3d 1094 (8th Cir.), cert. denied, 128 S. Ct. 721 (2007), but that case did not involve identical state and federal constitutional standards. See *id.* at 1097 (finding no exhaustion when the federal constitutional standard "is not necessarily synonymous with the standard imposed under Minnesota state law"). When, as here, the federal and state standards are not merely similar, but identical, Eighth Circuit precedent suggests that raising the state claim will fairly present the federal claim as well. See *McDonald v. Bowersox*, 101 F.3d 588, 598 (8th Cir. 1996) ("A petitioner who presents a state law claim in state court will avoid procedural default with respect to a federal claim if 'the claim the petitioner made in state court is synonymous with an accepted principle of federal law.'") (quoting *Myre v. Iowa*, 53 F.3d 199, 201 (8th Cir. 1995)), cert. denied, 521 U.S. 1127 (1997).[1]

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[1] Petitioner's suggestion (Pet. 14-15) that there is a general division in circuit law on what constitutes a "fairly presented" federal claim is without merit. Besides being irrelevant to the plain-error question resolved here, circuit law is in substantial agreement. In *Daye v. Attorney General of New York*, 696 F.2d 186 (en banc), cert. denied, 464 U.S. 1048 (1982), the Second Circuit identified a non-exhaustive list of criteria for determining whether a petitioner has fairly presented his federal habeas corpus claim, including "(a) reliance on pertinent federal cases employing constitutional analysis, (b) reliance on state cases employing constitutional analysis in like fact situations, (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution, and

Accordingly, even outside the context of plain error review, there is no conflict in the circuits on the fair presentation issue when the state and federal standards are identical. That makes sense, moreover. While state courts have no obligation to review lower courts' decisions in selecting cases for discretionary review, see *Baldwin*, *supra*, state courts are properly charged with knowledge of the requirements of both the state and federal Constitutions, cf. *Testa v. Katt*, 330 U.S. 386 (1947), and thus must be aware when their standards are identical, such that a ruling under the state constitution necessarily resolves the same question under the federal Constitution.

3. Certiorari is not warranted for two additional reasons.

First, petitioner's claim that Nara did not distinctly raise his incompetency claim as a federal constitutional question in the state courts is factually wrong. Nara's second petition for post-conviction relief specifically argued that his

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(d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation." *Id.* at 194. The courts of appeals have generally adopted or employed those same factors in whole or in part. See *Nadworny v. Fair*, 872 F.2d 1093, 1097 (1st Cir. 1989); *McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999); *Coleman v. Dretke*, 395 F.3d 216, 220 (5th Cir. 2004), cert. denied, 546 U.S. 938 (2005); *Williams v. Anderson*, 460 F.3d 789, 806 (6th Cir. 2006); *Wilson v. Briley*, 243 F.3d 325, 327 (7th Cir. 2001); *Watson v. Dugger*, 945 F.2d 367, 371-372 (11th Cir. 1991). The Second and Seventh Circuits have reaffirmed that position since *Baldwin*. See *Jackson*, 404 F.3d at 618; *Anderson v. Benik*, 471 F.3d 811, 815 (7th Cir. 2006).

incompetency at the time of the plea violated the federal Constitution. DCT App. 436-437. Although petitioner complains that Nara did not raise the federal Constitution on appeal in that case, that argument overlooks that Nara had prevailed below on incompetency grounds, making his incompetency the central issue on appeal. Moreover, it was the Commonwealth's appeal, and thus it was the Commonwealth that chose the issues to be raised on appeal, electing to rely upon purely procedural arguments concerning Nara's incompetency claim. When the Superior Court reinstated his pleas on appeal, Nara promptly reasserted his federal constitutional claim to the Pennsylvania Supreme Court and to this Court. *Id.* at 586, 595, 825-826; see generally *Dye v. Hofbauer*, 546 U.S. 1, 3-4 (2005) (per curiam) (federal claim raised in briefs is fairly presented).

Nara's first petition likewise expressly invoked the federal Constitution. See DCT App. 198, 200, 207-210, 213. The Superior Court, on appeal, addressed counsel's alleged ineffectiveness for failure to address Nara's incompetency. Pet. App. 6d. The claims were sufficiently overlapping that the Superior Court later held that its initial decision had resolved the incompetency claim, DCT App. 580, although the court then denied having addressed whether Nara's incompetency undermined the truth-determining process, and deemed that argument to be waived, *ibid.* Nara referred expressly to the federal Constitution in his appeal to the Pennsylvania Supreme Court. *Id.* at 825-826. Nara's third petition also specifically

invoked the protections of the federal Constitution. See 3d PCRA Pet. 3A & Exhs. A & B.

Consequently, contrary to petitioner's argument, this case simply does not present the question of whether a federal claim that is presented solely by reference to an identical state-law claim is fairly presented. Instead, consideration of the question petitioner raises would involve the record-bound analysis of whether a federal constitutional claim is fairly presented when it (i) is identical to a state law claim, (ii) is repeatedly raised in explicitly federal constitutional terms, see *Dye*, *supra*, (iii) is not affirmatively raised only on the *Commonwealth's* procedural appeal, and (iv) is confusingly described by the state appellate court as having been both previously resolved and previously waived, DCT App. 580. Even were petitioner not hobbled by the plain-error standard of review, the requested resolution of such a case-specific claim amounts (at best) to nothing more than an effort to obtain record-bound error correction.

Second, the court of appeals separately held that, even if the incompetency claim had not been fairly presented, there was no adequate state procedural bar because Pennsylvania courts do not generally or consistently bar review of such incompetency claims. See Pet. App. 24d-27d. Petitioner has not sought this Court's review of that portion of the court of appeals' judgment. Accordingly, the claim is waived, and review by this Court would not change the outcome of this case. In addition, Nara would also be entitled to demonstrate on remand that he could avoid

procedural default by demonstrating that either his mental incompetency or the ineffectiveness of his prior counsel (or both together) satisfies the cause-and-prejudice exception to procedural default. See, *e.g.*, *Edwards v. Carpenter*, 529 U.S. 446, 451-453 (2000).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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